THE
ART
OF
CONVEYANCING.

ARS CLERICALIS:

THE

ART

OF

Conveyancing

EXPLAINED.

Being a Collection gathered with great Care and Induſtry, out of the many Books of the Law.

Wherein the Nature and Effect of ſuch Deeds and Inſtruments, by which Lands are conveyed from one Man to another, are clearly demonſtrated.

Alſo the Forms and orderly Parts which ought to be obſerved in Deeds and Conveyances are laid open and explained.

By *R. G.* Gent.

Robert Gardiner

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G221

TO THE READER.

THE *Law of* England *conſiſts of ſeveral curious Parts or Branches, ſome whereof have relation to the Theory, others more immediately to the Practice. Of the later, not one hath given greater Reputation, or contributed more to the enriching its Profeſſors than* the Art of Conveyancing; *which proceeds chiefly from the Neceſſity attending it, in regard no E-*

ſtate or Property can poſſibly be ſetled or ſecured without it. There are ſeveral Books (indeed) in all Volumes already extant, of Conveyanceing; but many of them being deficient either in Matter or Form, heap't together without Judgment, and backt with no manner of Authority, do, inſtead of inſtructing the Tyro's of the Law, lead them into manifeſt Errors; neither is any of them expreſs upon this Subject, though moſt of them treat ſomething thereof. Therefore to demonſtrate to the World by a ſmall Eſſay what may be further performed in this Nature by more time

ime and thought, this little Tract hath ventured abroad; being a brief Collection out of thoſe many Books; where you have a Proſpect altogether, and in Order, not crowded with Precedents, nor mixt with improper Matter, but full and clear to the underſtanding of the whole Art, and ſcarce a Paragraph in the whole but what is warranted by two or three Authorities. It was chiefly intended for a help to Young Clerks, though perhaps none of the old Ones will have occaſion to repent the peruſing it. 'Tis true, there is no new Invention in it as to Matter,

To the Reader.

Matter, neither indeed can it be expected in Books of this Nature, which are or ought to be govern'd by Authorities and Precedents; and as to the Form or Method 'tis wholly new, and perhaps more compact and orderly than any Book of this kind.

Vale & fruere.

THE

THE CONTENTS.

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Adver-

Advertiſement.

Legis Series: Or the Proceſs of the Law in order, with ſome Entries both in Kings Bench and Common Pleas; uſeful for Young Clerks to direct them in their firſt Steps to Clerkſhip, *per* R. G. *Gent.* Price 6 *d.*

CHAP. I.

Shewing how property in Lands is gotten and transferred from one to another.

Of Property in Lands.

THE intent of this Treatiſe being to lay down and explain the Art of Conveyancing, whereby the property in Lands is transferred from one to another; I ſhall firſt ſhew the ſeveral ways by which property in Lands is or may be gotten:

And note, That property in Lands is gotten and transferred from one to another four ways.

Viz.
1. Entry.
2. Deſcent.
3. Eſcheat.
4. Conveyance.

I. Property in Lands by Entry, formally and ſtrictly taken, was, where a Man found a piece of Land that no other poſſeſſed, or had

Property by Entry.

had Title to, and entred thereon; This Entry gained him the property of it, and this ſeemeth to be grounded upon the Text: *Terram dedit Filiis hominum*, &c.

1 Occupancy. In the Caſe of Occupancy (which ariſeth by Conveyance) as, Where Lands are conveyed to *A.* for the Life of *B.* and *A.* dies without making any Eſtate or Aſſignment thereof, here whoſoever firſt entreth after the death of *A.* getteth property in that Land during the Life of *B.* for the Land cannot revert to him that leaſed to *A.* till *B.* die; and to the Heir of *A.* it cannot go, for it is not any Eſtate of Inheritance, nor deſcendable to the Heir (without ſpecial words) And as for the Executors of *A.* they cannot have it, for that it is not an Eſtate Teſtamentary, to go to them as the Goods and Chattels do, ſo as in truth no Man can entitle himſelf to the Land, and therefore the Law preferreth him that firſt entreth, and he is called *Occupans*, and ſhall hold it during the Life of *B.* but yet ſuch a one muſt pay the Rent, perform the Conditions, and do no

no waſt or harm, *N. B. fol.* 83. *Co. Lit.* 41.

But this Eſtate of the Occupant may be prevented at the making of the Grant, by adding theſe words *To have and to hold to A. and his Heirs during the Life of* B. for then tis deſcendable to the Heir. 1. Occupancy how prevented.

It may alſo be prevented after the making of the Grant or Leaſe for Life, (though the word Heirs be omitted) by aſſigning the Eſtate over to ſome Friends and their Heirs in truſt during the Life of *B.* &c. *Co. Lit. fol.* 41. *Shepards Touchſtone, pag.* 108. 2.

And note that the Statute 29 *Car.* 2. hath provided, That the Leſſee or Grantee may deviſe ſuch Eſtate for anothers Life, by his Will in preſence of three or more Witneſſes. 29 Car. 2.

If he deviſe it not, and his Heir become Occupant, it ſhall be chargeable in his hands, as Aſſets by Deſcent, as in caſe of Lands by Feeſimple. *Stat. eod'.* Ibid.

And in caſe there be no ſpecial Occupant, then it ſhall go to the Executors or Adminiſtrators of the Ibid.

party that had the Grant, and ſhall be Aſſets, *Stat. eod.* See the Statute.

Property by Deſcent.

2. Inheritance is Fee-ſimple to a Man and his Heirs for ever.

Property in Lands gotten by Deſcent, is where a Man having Lands of Inheritance dieth, not making any diſpoſition thereof, but leaveth it to go as the Law appointeth, and the Law appointeth, that it be caſt upon the Heir, that is called a Deſcent in Law; and upon whom this Deſcent is to light, is the queſtion.

Lineal Deſcent

Now Deſcent is either Lineal or Collateral; Lineal Deſcent is conveyed downward in a right-line from the Grand-father to the Father, and from the Father to the Son, and from the Son to the Nephew, *&c.*

Collateral Deſcent.

Collateral Deſcent, is ſpringing out of the ſide of the whole Blood, as Grand-fathers Brother, Fathers Brother, *&c.* as you may plainly diſcern by the Degree of Parentage in the Lord *Coke upon Lit. fol.* 15.

Yet

Yet it may be here to the purpose in hand, and expected, that something more be said concerning the Descent of Lands; Therefore take these Rules following, borrowed from Mr. *Noy*, that Learned Expositor of the Law.

Nota, *That Lands, or an Estate of Inheritance (which is to a Man, and his Heirs for ever) doth always descend, for it may not lineally ascend from the Son (which is seized in Fee and dieth) to his Father, but descendeth to his Uncle or Brother, and to his Heirs, which is the next of the whole Blood; for the half Blood shall not Inherit, but the most worthy of Blood; as of the Blood of the Father, before the Mother, and of the elder Brother, before the other, if Born within Espousals, See* Noys Max. p. 22.

But note, That if Lands be once setled, or entailed in the Blood of the Father, the Heir of the Mother shall never have them, because they are not of the Blood of him that was last seized; *Idem page* 29.

For a Deſcent ſhall be intended to the Heir of him that was laſt actually ſeized, *Idem p.* 22.

And if a Man diſſeiſeth another, and dieth ſeized, and his Heir entreth, or maketh a Feoffment to another in Fee, or in Tail, and he dieth, and his Heir entreth; theſe Deſcents put the diſſeiſed, *&c.* from an Entry, *Nov. Max. p.* 34.

But a dying ſeized of a Term for Life, or of a Remainder or Reverſion, doth not take away an Entry, for he muſt die ſeized in Fee, *Idem pa.* 34, 35.

The Siſter of the whole Blood, (where her elder Brother did enter after the death of his Father) ſhall inherit, before his Brother of the half Blood, or any other Collateral Couſin, *Ibid.*

Yet notwithſtanding ſuch a one may be Heir to a Common Anceſtor; as if the Land, Rent, Advowſon, or ſuch like do deſcend to the elder Son, and he die before any Entry, or Receipt of the Rent, or Preſentment to the Church, (*&c.*)

(*&c.*) then the Heir of him that was last actually seized, shall Inherit (as the younger Son, *&c.*) and the reason is, because that in all Inheritances in Possession, he which claimeth Title thereunto as Heir, ought to make himself Heir to him that was last actually seized, *Idem p.* 22, 23.

Note, The Possession of a Lessee for Years, or of a Guardian, shall invest the actual Possession and Frank-tenement in the elder Brother, *Idem p.* 23.

But if he die seized of a Reversion, or Remainder, or an Estate for Life, or in Tail; there he which claimeth the Reversion or Remainder as Heir, ought to make himself Heir to him that had the Gift, *Ibid.*

And so in case of a Purchase, it shall descend to the Heir of the Blood of the first Purchasor; As if the Father purchase Land, and it descendeth to his Son, who entreth and dieth without Heirs of the Fathers part, then the Land shall descend to the Heirs of the

Mother of the Father, or of the Father of the Father, (as the Heirs may be,) and not to the Heirs of the Mother of the Son; although they are more near of Blood to him that was last seized; yet they are not of the Blood of the first Purchasor, *Ibid.*

If the Heirs be Females in equal degree; as Daughters, Sisters, Aunts, &c. they shall Inherit together, and are but one Heir, and are called Parceners, *Idem p.* 24.

But note, If a Man be seized of Lands or Tenements to hold to him and his Heirs for ever; It is the best Inheritance a Man may have, and he may Sell, or Grant, or make his Will of those Lands; but if otherwise he die, they do descend to his Heir of the whole Blood; *ut supra*, with respect to the several Cases, &c. See *Idem, pa.* 20.

Property

Property by Eſcheat.

It where the Owner of Land dieth in poſſeſſion without Child or other Heir, then the Land for lack of Heir, is ſaid to eſcheat to the Lord of whom tis holden. 31

And it is to be underſtood, That all Lands are ſaid to be holden of the Crown either immediately or mediately, and the Eſcheat pertaineth to the immediate Lord, not to the mediate Lord, *See Camb. Brit. pag. 93. Cowels Interp. Tit. voc.*

The lack of Heir happeneth principally in two Caſes, the one where the Owner of the Land is a Baſtard, the other where the Owner is attainted of Treaſon or Felony; for neither can a Baſtard have an Heir (unleſs he be his Child) nor a Man attainted of Treaſon or Felony, have any Heir though he be his own Child. Magna Charta 31. Fitz. N. B. fol. 143. T. &c.

Property by Conveyance

4. Divers Eſtates by Conveyance.

Is diſtributed into divers Eſtates.

Viz. for { 1. Years. 2. Life.

Viz. in { 3. Tail. 4. Fee ſimple.

And theſe Eſtates are created either by Word, Writing or Record.

By Parol. 1. By Word or Parol, as Leaſes for Years.

By Writing. 2. By Writing, as by Indenture, Grant, *&c.*

By Record. 3. By Record, as by Fine, Bargain and Sale, *&c.*

Nota. But note, That Leaſes parol are void if they exceed three Years from the making, and if they do not exceed, yet two third parts of the improved value of the thing demiſed muſt be reſerved to the Landlord, See Stat. 29 *Car.* 2.

1. Of Leaſes for Years.

Leaſes for Years, are moſtly made by Indenture, by words of Demiſe, Grant and to Farm let, with

with ſuch Conditions and Covenants as the parties agree upon, *Co. Lit. fol.* 45. *Bro. Leaſes* 60. 67. *b.*

And ſuch Leaſes be called Chattels Real, and are not inheritable by Heirs, but go to the Executors or Adminiſtrators; they be ſaleable for Debt in the Life of the Owner, or in the Executors or Adminiſtrators hands by Writ of Execution: They be forfeited to the Crown by Outlary, or by Attainder for Felony, Treaſon or *Præmunire*, &c. See *Wentworths Executor pa.* 76.

They are called Chattels Real, &c.

Are ſaleable, &c.

32 L. Aſſ. pl. 6.

If a Leaſe be for 500 Years it is but a Chattel, and cannot be entailed, *Regiſtr. Practical p.* 192.

Extents for Debts are of the ſame Nature as Leaſes for Years.

Of like nature are, Intereſts gotten in other Mens Lands by Extents for Debt upon Judgment, in any Court of Record, upon Statute-Merchant, or of the Staple, or Recognizances, and the Tenants thereby are called Tenants by Elegit. All theſe alſo be called Chattels Real, and do go to the Executors or Adminiſtrators, and not to the Heir, and are ſaleable and forfeitable as Leaſes for Years are, *Idem pa. ead.*

See more hereafter, Ch. 2.

Leaſes.

Leaſes for Lives

2. Leaſes for Lives are Freeholds. *Bract. lib. 2. c. 9.*

Are called Freeholds, which are alſo made by Writing or Record; And when by Writing, there muſt be Livery and Seiſin given at the making of the Leaſe, the manner of which Livery and Seiſin is ſet down, *Ch.* 4.

Not ſaleable but extendable.

This Leaſe for life is not ſaleable by the Sheriff for Debt; but the Land is to be extended at a yearly value, to ſatisfie the Debt, neither

Not forfeited except, &c.

is it forfeited by Outlary, (except in Felony) nor by any of thoſe means before mentioned, to which Leaſes for years are liable and ſubject (ſaving only Attainders for Treaſon, Felony or *Præmunire*) and then only to the Crown, not to the Lord of the Eſcheat, *Vide* 25 *Ed.* 3. *Stat.* 5. *cap.* 2.

Will go to the Heir.

This Eſtate will go to the Heirs (if the word (Heirs) be contained in the Grant) if not contain'd,

Or Executor.

Then to the Executor, in caſe of no ſpecial Occupancy, as before *Page* 2, 3.

A Leaſe for life, or for years, may alſo be made by Fine of Record, Bargain and Sale, or by Covenants to ſtand ſeiſed to uſes, upon good conſideration of Marriage or of Blood, See *Bro. Fines* 106. How Leaſes for Life may be made.

Note, If a Man have a Leaſe for never ſo many years determinable upon life or lives, (which ſome Perſons call a Leaſe for lives) it is but a Chattel, *Wentworths Executor, page* 28.

Of Entails

Entail ſignifies Fee entailed, That is, Fee ſcanted or limited and tied to certain Conditions. See *Cowels Int. Tit. eod.* 3. Entail defined

Theſe Entails may be created by a Gift with Livery and Seiſin to a Man and the Heirs of his Body; This word (Body) making the Tail, may be reſtrained to Males or Females, to the Heirs of the Bodies of the Husband and Wife, to the Body of his Father or Grand-father in Tail ſpecial or general. How created.

En-

When they began.

Entails began by a Statute in *Edward* the Firſts time (*Weſtm. ca. 2. de Donis Conditionalibus*) (for before that Statute Feoffees after they had Iſſue, had power to alien and diſinherit the Iſſue contrary to the mind of the Donees:) And by this Statute they were made ſo ſtrong, as that the Tenants in Tail could not put away the Land from the Heir by any Act of Conveyance, or Attainder; nor let it, or any way charge or incumber it, longer than for his own life; (ſee the Statute.)

By Statute *Weſt. ca. 2.*

The inconveniencies by that Statute.

But the inconveniency thereof was very great; for by this means the Lands were ſo ſurely tied upon the Heir, as the Father could not put it from him; It made the Son diſobedient, negligent and waſtful, Marrying often without the Fathers conſent, and to grow inſolent in Vice, knowing there could be no check of diſinheritance to reſtrain him: It made alſo the Owners of entailed Lands leſs fearful themſelves to commit Felonies, Murders, Manſlaughters and Treaſons; for that they knew that none of their

Committing Felonies, Murders, Manſlaughters and Treaſons.

their Acts could hurt their Heir in his Inheritance. It hindred Men that had entailed Lands, that they could not make the least Profit of their Lands, by taking Fines or other Improvements: For that none upon so uncertain an Estate of the Owners life, would give him a Fine of any value, nor lay any great Stock upon the Land that it might yield an improv'd Rent.

Hindred Improvement of Lands.

And lastly, These entailed Lands defrauded the Crown and many Subjects of their Debts, for that the Land was not liable thereto longer than for his own life, which made that the King could not safely commit any Office of account to such whose Lands were entailed, nor other Men to dare to lend them Mony.

Defrauded the Crown and Subjects of their Debts.

Hindred the Owners to borrow Mony.

These Inconveniencies were all remedied by later Statutes, as namely by the Statutes of 4 *Hen.* 7. and 32 *Hen.* 8. 36. A Tenant in Tail may disinherit his Son by Fine and Proclamations; And by that means also may make it subject to his Debts and Sales; And by a Statute made in 26 *Hen.* 8. *cap.* 13. Te-

The Inconveniencies remedied by Fine, &c.

Grant by several Statutes

Which make Tenants in Tail forfeit for Treason, and they may make Leases.

Tenant in Tail doth forfeit his Land for Treason; And by another Statute made in the 32 of *H.* 8 *cap.* 28. He may make Leases good against his Issue for twenty one years, or three lives, (so it be not his chief Lands or Demeans, nor a Lease in Reversion, nor a lesser Rent reserved, than the Tenants for the most part of twenty years before have paid; And so as such Lease have not any matter of discharge for doing Waste or Spoils) and by a Statute made the 33 *H.* 8. Tenants in tailed Lands are liable by Extent for the Kings Debt: And by a Statute 13. *Eliz.* 4. they are saleable for his Arrearages upon his accounts for his Office.

They are liable to the Kings Debt, and are saleable, but

not forfeited for Felony

Not extended

Except the Tail be cut off

So that now it resteth that entailed Lands have these two Priviledges only, *viz.* Not to be forfeited for Felonies, nor extended for Debt after the Parties Death, except the Tail be cut off by Fine or Recovery.

Note, These entails are now usually created by Settlements upon Marriage for the benefit

ſit of the Poſterity, and may be cut off as before is ſhewn; And theſe ſettlements entailing ſuch Land unto the Iſſue or Poſterity, deſcribes the Uſes, Behoofs, Intents, Purpoſes, Proviſos, Conditions, Powers and Limitations of the Parties thereto and thereby meant, and the Lands are uſually made over to Truſtees by Fine and Recovery to ſtand ſeiſed to ſuch Uſes, *&c.*

Fee-ſimple what.

The laſt and greateſt Eſtate of Land is Fee-ſimple, which is an Eſtate abſolute to one and his Heirs for ever; Therefore he that maketh a Leaſe for life to one, or a Gift in Tail, may appoint a Remainder after that Eſtate to another for life, or in Tail, and a third in Fee-ſimple; but after a Fee-ſimple he can limit no further Eſtate: And if a Man does not diſpoſe of a Fee-ſimple by way of Remainder when he maketh the Gift in Tail, or for life, or for lives, then the Fee-ſimple reſteth in himſelf as a Reverſion, *Co. on Lit. fol.* 112, 113.

To one and his Heirs for ever.

Brook Tit. Don. & Remainder, fol. 245 *Glanv. li.* 7. *cap.* 1.

Difference between Remainder and Reverſion.

And the difference between Remainder and Reverſion is this; The Remainder is alway a ſucceeding Eſtate at the time when the precedent is appointed; But the Reverſion is the Eſtate left in the Giver after a particular Eſtate made by him for years, life, or in tail See hereafter *Ch.* 5. *Bract. lib.* 2. *cap.* 25.

Note, A particular Eſtate is ſuch as is derived from a General Eſtate

Where the Remainder is made with the particular Eſtate, then it muſt be done by Deed in Writing with Livery and Seiſin; and if the Giver will after diſpoſe of the Reverſion that remaineth in himſelf, he is alſo to do it by Writing, and the Tenant is to have notice of it, and to attorn to it, which is to give his aſſent (as to ſay) I do agree to the Grant made to you, or I am well contented with it, or I do attorn unto you, or I do become your Tenant, or deliver to the Grantee a peny by way of Seiſin of Rent in the name of the whole, it is good for all, *Noy Max. Pa.* 63. The manner of Indorſement thereof is hereafter ſet down *Ch.* 2.

Note, It muſt be done in the life-time of the Grantor. See Attornment.

And

And except the Tenant will thus attorn, the party to whom the Reverſion is granted cannot have the Reverſion, neither can he compel him by any Law to attorn, unleſs the Grant of the Reverſion be by Fine, and then he may by Writ (called *Quid Juris clamat*, directed to the Tenant to ſhew his Eſtate.) This Writ iſſues out of the Record of the Fine which remaineth with the *Cuſtos Brevium* of the Common Pleas before the Fine be ingroſſed, for afterward it cannot be had, *Weſt Symb. Part* 2. *Tit. Fines §.* 159. And if he do not purchaſe that Writ, yet by the Fine the Reverſion ſhall paſs: But the Tenant ſhall pay no Rent, nor be puniſhed for any Waſt in the Houſes or Woods before Attornment, or unleſs the Reverſion be granted by Bargain and Sale by Indenture, and that inrolled within ſix Months. The end of Attornment is to perfect Grants, and therefore may be made upon a Condition, or for a time, neither can the Tenant attorn for part of a thing granted, but it ſhall enure for the whole abſolutely, *Noy Max.*

Reverſion paſſes not without Attornment

Unleſs the Grant be by Fine

Then there is a Writ to compel.

If the Writ be not ſued

The Reverſion may paſs, but Tenant not puniſhable for Waſt, unleſs granted by Indenture inrolled within ſix Months, 39 H. 6. 24.

Max. pag. 64. If the Tenant have true notice of all the Grant, then such Attornment is void, *Ibid. pa.* 65. See Chap. 5.

Voidance.

What perils Fee-simple Estates are liable to.

These Fee-simple Estates lie open to all perils of Forfeiture, Extents and many the like Inconveniencies.

CHAP. II.

Shewing the nature and effect of such Deeds by which Lands usually pass, and are conveyed from one to another.

LAnds are conveyed several ways, and by several Deeds or Instruments.

Ordinary

Ordinary Deeds by which Lands usually pass, are

- Feoffment
- Fine
- Recovery
- Indentures to lead the uses of Fines and Recoveries
- Bargain and Sale
- Covenants to stand seised to Uses
- Gift or Grant
- Lease
- Lease and Release
- Assignment
- Exchange
- Surrender
- Confirmation
- Revocation and new Declaration
- Wills in Writing.

Of which in their Order.

And first of Feoffment.

A Feoffment is where by Deed Lands are given, and Livery and Seisin made: It is not called a Feoffment unless the Fee-simple be conveyed; but otherwise it is called a Lease for Life or Gift in Tail, as is above-mentioned. *M. West,*

Feoffment what.

It maketh Fee-simple.

M. West, part 1. *Symb. Lib.* 2. § 235. ſaith, It ſignifieth in our Common Law any Gift or Grant of any Honours, Caſtles, Mannors, Meſſuages, Lands or other corporal and immoveable Things of like nature, unto another in Fee-ſimple, that is, to him and his Heirs for ever, by delivery of Seiſin and Poſſeſſion of the thing given, whether the Gift be made * by Word or Writing; and when it is in Writing it is called a Deed of Feoffment; and in every Feoffment the Giver is called the Feoffor, and he that receiveth by vertue thereof, the Feoffee. And *Lit. Lib.* 1. *cap.* 6. ſaith, That the proper difference between a Feoffor and a Donor is, That the Feoffor giveth in Fee-ſimple, the Donor in Fee-tail.

* Nota, as before, muſt be in Writing.

Difference betwixt Feoffor and Donor.

And note, That a Joynt-Tenant cannot enfeoff his Companion, *Noy Max. p.* 57.

A Man cannot enfeoff his Wife, *Ibid.*

A Diſſeiſor cannot enfeoff the Diſſeiſee, for his Entry is lawful upon the Diſſeiſor, *Ibid.* 56.

But

But note, That a Copartner may make a Feoffment of his part, or he may Releaſe, *Ibid.* 57.

A Fine is a Ceremonious Conveyance of Lands or Tenements, or of any thing inheritable, having Being at the time of ſuch Fine, to the end to cut off all Controverſies, *Weſt part* 2. *Symb.* §. 1. ſaith, They are Covenants made before Juſtices and entred of Record, it begins thus: *Hæc eſt Finalis Concordia, &c.* (This is the Final Agreement, &c.) And this muſt be done before the Kings Judges in the Court of Common Pleas concerning Land, that one Man ſhall have from another to him and his Heirs, or to him and to the Heirs of his Body, or to him for life, or for Years; whereupon alſo a Rent may be reſerved, but no Conditions or Covenants. This Fine is a Record of great Credit, and upon this Fine four Proclamations are made in the Common Pleas every Term for the four next Terms together. And if any Man having right to thoſe Lands make not his claim within five years next after theſe Pro-

Fine what.

Where to be made.

Rent may be reſerved.

Four Proclamations. 3 El. 2.

If the Heir claim not within five years.

He loseth his his Right unless it be an Infant, Woman Covert, beyond Seas, or Mad.

Proclamations are ended, he loseth his Right for ever, unless he be an Infant, a Woman Covert, one beyond the Seas, or one Mad, and then his Right is saved, so that he claim within five Years after his first coming to full Age, after the death of her Husband, after their return from beyond the Seas, and after the Recovery of his Wits; as the Case falleth out, Example follow.

Fine is called Feoffment on Record.

This Fine is called a Feoffment of Record, because it includeth all that a Feoffment doth, and worketh farther of his own nature, and barreth Entails peremptorily whether the Heir claim within five years or not, if he claim by him that levied the Fine.

Barreth Entails claim or not claim.

Fine how begins.

A Fine begins by Præcipe *and Concord*

Præcipe what.

The *Præcipe* is a Commandment or Charge supposed to be given to the Cognizees to hold Covenant with the Cognizors of such and such Lands, *&c.*

Concord what

The Concord is the very Covenant or Agreement betwixt the Parties Cognizors and Cognizees.

In

In the form whereof many things are to be regarded, as if it be ſingle, whether it be *ſur Cognizance de Droit come ceo que il ad de ſon Done*, or *ſur Grant, Done, Releaſe* or *Confirmation*, ſuch and the like be called ſingle Fines, nothing being rendred back by any of the Cognizees to any of the Cognizors, ſee *Weſt, Tit. Fines.*

Things to be obſerved in the form thereof.

Single Fine.

A double Fine is with a Render, what Eſtates are to be created thereby, and of the Reſervation of Rents, *nomine pœnæ*, and Clauſe of Diſtreſs and Services, with the Clauſe of Warranty: For which it is to be noted, That when a Fine is levied to divers Cognizees the Right ſhall be limited to one of them only, and the Eſtate limited to his Heirs only, whoſe Right it is knowledged to be, *Ibid.*

Double Fine what.

How the Right ſhall be limited.

3 H. 6. 42.
24 E. 3. 64.

(As this.)

Et eſt Concordia talis, ſcilicet quod pred' A. Cogn' Tenementa pred' cum pertin' eſſe jus ipſius B. ut illa quæ iidem B. & C. habent de dono pred' A. Et il' remiſit & quiet' claim' de ſe &

Example.

Hæredibus suis præfat' B. & C. & Hæredibus ipsum B. &c.

Release how to be. 21 Ed. 3. 33.

And likewise the Release and Warranty must be from the Heirs of one of the Cognizors; for in a Fine from divers the Fee must be supposed to be in one of them only. *West. Pres. Tit. Fines* §. 30.

Of what things it may be.

And a Concord cannot be of any other thing than is contained in the Writ of Covenant, and not of a Foreign thing if it be not consequent. *Ibid.*

The Warranty how to be made.

And if divers joyn in a Fine the Warranty must be by them and the Heirs of one of them which is the Owner of the Land, 44 *E.* 3. 1.

Divers sorts of Warranties.

And note, That Warranties be sometimes General, That is, against all Men; some against all except certain Persons; some against certain Persons only; some against every Cognizor and his Heirs severally; some against one of the Cognizors and his Heirs only; some of all the Lands in the Fine; some of all except part, and some of part only certainly expressed. *West. Tit. Fines*, §. 147.

He

He who acknowledgeth the Fine is called Cognizor, and he to whom the Fine is levied is called the Cognizee; and it is requisite that either the Cognizor or Cognizee be seized of the Lands in the Suit at the time of the levying thereof, otherwise the Fine is void, 41 *Ed.* 3. 14. 22 *H.* 6. 13. 3 *H.* 6. 27 *H.* 8. 4. & 20. 37 *H.* 6. 34. 22 *H.* 6. 57. See *West, Tit. eod.* unless it be by a Vouchee after he hath entred into the Warranty to the Demandant, for he being Tenant in Law may confess the Action; but a Fine by Vouchee levied to a Stranger is void, 8 *H.* 4. 5 *H.* 7. 40. See *West, Ibid.*

The Parties must be seised at the time of levying.

Exception.

All Persons Male and Female may be Cognizors, except Ideots, Madmen, Lunatiques, Men having the Lethargy, Blind, Deaf or Dumb, and these be hindred by nature; Friers, Nuns, Monks, (who are dead in Law) and Persons having Joynt-power, as a Bishop without the Dean and Chapter, a Dean without his Chapter; a Parson, Vicar, Prebendary without their Ordinary; a Mayor without his

Who may be Cognizors.

Exceptions of Persons dead in Law, &c.

Commonalty, Masters of Colledges without their Fellows, and the single Members of every Corporation or Society, and these be hindred by the Law, *West*, *ibid.*

Cautions.

Of Husband without his Wife.

A Husband without his Wife ought not levy a Fine of her Lands, for she and her Heirs may avoid it after his death, 32 *H.* 8. *cap.* 28 12 *E.* 4. 12. 42 *E.* 3. 20.

Care to be taken by Infants

Infants, *i. e.* all Persons under one and twenty Years ought to have a special care how they levy Fines, for they must be reversed again during their Infancy, otherwise they are good, and the Court must see them at such reversal thereby to judge of their Age, 50 *E.* 3. 5. 17 *E.* 3. 52. 78.

Drunken and old Doters not capable.

It ought to be regarded, that Drunken-men and old doting Persons be not Cognizors, for their Fines are not reversable, 17 *E.* 3. 5. & 8. 17 *Ass.* 17.

Care to be taken by a Married Woman under Age.

A Married Woman under Age ought to take heed that she levy not a Fine of her own Lands, for she

ſhe cannot reverſe it during her Husbands Life, neither after his Death if ſhe be then at full Age, 50 *E.* 3. 5. *Aſſ. pla.* 53.

A married Woman of age ought not to levy a Fine but with her right Husband, 7 *H.* 4. 23. 42 *E.* 3. 20. Of Age.

And ſhe muſt beware how ſhe with her Husband levy a Fine of her Joynture, leſt ſhe thereby loſe her Thirds if the Joynture were well ſetled before Marriage, *Dyer fol.* 359. *pla.* 49. With her Husband.

If ſhe without her Husband levy a Fine of her own Lands wherein ſhe hath Fee-ſimple, it will be a Bar againſt her and her Heirs, unleſs her Husband avoid it by Entry, or otherwiſe during her Life. Without her Husband.

If he be Tenant by Curteſie, he may reverſe it after her Death, 17 *E.* 3. 52. & 78. 17 *Aſſ.* 17. 7 *H.* 4. 23. Tenant by Courteſie.

If a Woman during her firſt Husbands Life marry a ſecond, and with him, and by his Name knowledge a Fine, it ſhall not bind her, 7 *H.* 4. 22, 23. becauſe ſhe is miſnamed. Fine by Woman having two Husbands.

With her right Husband.

And if she levy a Fine with her right Husband by a wrong Christian Name, she is bound by Estoppel during her Life; and the Tenant may plead that she (by such a Name) levied the Fine, 1 *Ass. pla.* 11. *Brook Fines* 117.

(Of Cognizors.)

Of the Estates of Cognizors who may levy.

Persons outlawed or waved in personal Actions may alien by Fine, 9 *H.* 6. 20. 21 *H.* 7. 7.

Persons attainted of Felony or Treason may levy by Fine; but their Fines are void against the King, and the Lord of whom the Lands be holden, 9 *H.* 6. 20. 21 *H.* 7. 7.

Tenants for Life may.

Tenant for Life may levy a Fine, *sur Graunt* and *Release* of the Lands which he holdeth for Life, to hold to the Cognizee for Life, of the Tenant for Life, 44 *E.* 3. 36. But if the Estate be larger, it is a forfeiture of his Estate, 4 *H.* 7. *Noy* 30.

Forfeiture of Estates.

And so the Law is the same of such Fines by Tenant in Tail, after possibility, Tenant in Dower, or by the Courtesie, 39 *E.* 3. 16. But

But it seemeth to be no forfeiture of a Rent, 2 *H.* 5. 7. Rent no Forfeiture.

Yet a particular Tenant, as in Dower, by Courtesie, or for Life, cannot grant and surrender their Estate to the Owner of the Reversion or Remainder, 17 *E.* 3. 62. Particular Tenant.

Tenant in Common, or Joynt-Tenant may levy a Fine of his part, 26 *H.* 8. 9. so a Copartner of his part, *Dyer* 334. Tenant in Common.

So may Tenant in Tail, General or Special. Tenant in Tail

Also Tenant in Fee-simple, in Remainder or Reversion. Tenant in Fee-simple.

Cognizors must be certainly named by their right Names of Baptism and Surnames, and their Additions, as Knight, Esquire, Gent. *&c.* are commonly used in Fines, *West, Tit. Fines*, §. 14. Cognizors how must be named.

(*Of Cognizees.*)

All such Persons as may be Grantees, or take Contracts may be Cognizees; as Persons of full Age, Infants, Femes-Covert, Madmen, Lunaticks, Ideots, Men imprisoned, Men without the Realm, and all Corporations and Civil Bodies; Men attainted of Felony Who may be Cognizees.

or Treason, Men outlawed in personal Actions, Bastards, Clerks convict, &c.

Exceptions of Persons dead in Law.

But Persons civilly dead, as Monks, Friers, &c. cannot be Cognizees, because they want Civil Capacity, *West, Pres. Tit. Fines, §.* 15.

Cognizees how to be named.

Cognizees in Fines must be named by their proper Names and Sirnames; For a Fine levied to *A.* and *Sibel* his Wife (where her Christian Name was *Isabel*) was holden void, 1 *Ass. pla.* 11. the rest in order; as for the Cognizors, *mutat' mutand'*.

West Tit. Fines Sect. 15.

Who may take knowledge of Fines in Court

All, or two of the Justices of the Common Place may in open Court take knowledge of Fines, and Record them by vertue of their Offices; And the Justices of the Common Place be the only Judges for the recording of Fines; and all Cognizances thereof must be certified thither, 15 *E.* 2. 36 *H.* 6. 34, 44 *Ed.* 3. 38.

Fines taken out of Court.

The Chief Justice of the Common Place by his Prerogative of his Office, may take Cognizance of Fines in any place out of the Court, and certifie the same without

out a *Dedimus Poteſtatem*, *Dyer* 224. *pla.* 31.

By the Statute 2 *E.* 6. *cap.* 28. Fines may be levied in the County Palatine of *Cheſter*; and by 37 *H.* 8. *cap.* 19. of Lands in the County Palatine of *Lancaſter*. Where Fines may be levied.

And by 5 *El. cap.* 27. within the County Palatine of *Dureſme* alias *Durham*.

Fines may be levied of all things being *in eſſe tempore Finis*, and certainly expreſſed in the Writs, 18 *E.* 4. 22. Of what things a Fine may be levied.

Fines may be levied of all things, whereof a *Præcipe quod reddat* lieth, *Weſt, Tit. Fines*, §. 25.

Lands bought of divers Perſons by ſeveral Purchaſors may paſs in one Fine, and then the Writ of Covenant muſt be brought by all the Vendees againſt all the Vendors; and every Vendor muſt Warrant againſt him and his Heirs only. Several Lands paſs in one Fine.

And theſe Joynt Fines are ſeaſonable when the Purchaſes are of ſmall Value, and the Charges would exceed the Value. The Convenicency.

Fines may not be levied of things incertain, as *de Tenemento*, 3 *Ed.* 4. 19. Of what things Fines may not be levied.

Lands reſtrained.

Nor of Lands reſtrained from ſale by Act of Parliament, 32 *H.* 8. *cap.* 36.

Lands aſſured for Joynture.

Nor of Lands of the Husband or his Anceſtors aſſured for Joynture, Dower, or in Tail to any Woman by means of her Husband, or his Anceſtors: For if ſhe grant a greater Eſtate than for her Life; her Eſtate is preſently forfeited, *Plow. fol.* 459.

Lands in ancient Demeſn.

Nor of Lands in ancient Demeſn, for it may be reverſed by a Writ of Diſceit brought by the Lord of Ancient Demeſn, 7 *H.* 4. 44. 8 *H.*4 23. *Reg. fol.* 13. *b.*

Mixt Lands.

But if it be both of Ancient Demeſn, and of Lands at the Common Law, it ſhall be good for the Lands at the Common Law, 7 *H* 4. 44.

What Perſons be barred by Fines.

Privies in Blood; as Heirs of the Cognizors claiming by the ſame Title that their Anceſtors had that levied the Fine, be barr'd preſently thereby, whether they be void of Impediments or no, 1 *R.* 3. *c.* 7. 4 *H.*7. *c.*24. *Br. Fines* 109.

Strangers excepted.

But Strangers to Fines, (that is, ſuch as be not Parties or Privies) have

have years after Proclamation to enter and claim their Right, *Ibid.*

The like time have Infants, after they accompliſh their full Age, *Plow.* 367. *a.* 359. *b.* 4 *H.* 7. *cap.* 24. Infants.

The like liberty have Madmen and Lunaticks after they be cured of their Maladies, *Plow. fol.* 375. & 366. Madmen, &c.

Alſo Feme-Coverts, or married Women being Strangers to the Fine, after the Death of her Husband. Feme-Coverts.

Nota, If a ſingle Woman having preſent Right, take a Husband who ſuffereth the five years to incur, ſhe is for ever barr'd. Five years ſuffered to incur.

Priſoners Strangers to the Fine ſhall have five years after their inlargement, *Plow.* 360. *a.* 375. 366. *a.* Priſoners.

But Civil Bodies and Corporations, having an abſolute Eſtate, ſo as to maintain a Writ of Right; as Mayor and Commonalty, Dean and Chapter, *&c.* are barr'd by five years, *Plow. fol.* 538. *T.* 20 *Eliz.* Civil Bodies.

But Deans, Biſhops, Maſters of Hoſpitals, Parſons, Vicars, Prebendaries, *&c.* Which may not have a Writ of Right, are not barr'd by five years, *Plow.* 538. *a.* Exception.

But

Impediments removed after Proclamation.

But note alſo, That ſuch Perſons who have ſuch Impediments, as aforeſaid; if after Proclamation the ſaid Impediments be wholly removed, and afterwads they fall into the like again, and die, their Heirs ſhall not have five years claim anew; but the firſt years begun immediately after the firſt removal of the ſaid Impediments ſhall run on to five years, and ſhall bind the Heirs, *Plow. fol.* 375. *a.*

Four Proclamations.

Note, *There muſt be four Proclamations in four Terms, one in each Term.*

Thus much of Strangers to Fines, having preſent Right at the Proclamation.

Title deſcending after Proclamation.

Yet ſuch Strangers to Fines, and void of ſuch Impediments, whoſe Right or Title cometh or deſcendeth to them after the Proclamation, have five years after the coming of ſuch Right, 1 *R.* 3. *cap.* 7. 4 *H.* 7. *cap.*24. *Plow. fol.* 378. *a. b.*

Limitation after a Reverſion accrueth.

So he in Remainder or Reverſion, depending upon an Eſtate of Free-hold, after the Remainder or Re-

Reverſion accrueth, hath five years to enter, and, if he die before Entry, his Heir hath only five years to enter after the Death of the particular Tenant, *Plow. fol.* 374. *a. b.*

And alſo ſuch Strangers to Fines as are not void of ſuch Impediments, having future Right, have five years after ſuch Impediments removed, 1 *R.* 3. *c.* 7. 4 *H.* 7. *c.* 24. *Plow. fol.* 364. *a.* Fines after Impediments removed where there is future Right.

Such Strangers to Fines, as have neither preſent nor future Right at the levying thereof, by reaſon of any matter had afore the Fine, whoſe Right groweth either intirely after the Proclamation, or partly before, and partly after, may enter or claim when they pleaſe, within the time of the preſcription; As if the Father die ſeized, his eldeſt Son being poſſeſſed, and the youngeſt Son entreth, and is diſſeized, and a Fine with Proclamation levied; and after the eldeſt Son is deraign'd, *i. e.* diſcharged of his Profeſſion or Religion: It ſeemeth he is bound to no time. Neither preſent nor future Right. Example.

So if the Husband levy a Fine of his own Lands, whereof his Wife Dower.

is

is Dowable, and die, and five years paſs, ſhe is not barred of her Dower; for before his Death ſhe had only a Poſſibility, and not any Title to Dower, *Plow. fol.* 373. *a.*

Several future Rights growing at ſeveral times.

And if Strangers have ſeveral future Rights, by divers Titles growing at ſeveral times, they ſhall have ſeveral five years from the time that their ſeveral Titles firſt accru'd unto them, *Ibid.*

Strangers having neither preſent nor future Right.

And Strangers to Fines having neither preſent nor future Right to the Tenements in the Fine, but unto ſome thing in, or iſſuing out of the ſame; as Rent, Common, Way, Eſtovers, or any ſuch charge out of the Land, ſeem not barrable at all: For it ſeemeth that theſe Fines extend only to bind the Eſtate, Title, Right, Claim, Entry and Intereſt, in and to the Land, and no Profits to be taken out of the Lands, nor to take power given to Executors, or others to ſell the Land, *Brook Tit. Fines* 123.

Plea to a Fine that a Stranger was ſeized.

It is a good plea to a Fine, to ſay, That *J. S.* was ſeized at the time of levying it, and before, without that, That the Parties to the

the Fine had any thing therein at the time of the Fine levied, 9 *H.* 4. 27. 3 *H.*6. 27.

Or that the Parties to the Fine had nothing, *&c.* But that *A. B.* had, whoſe Eſtate he hath, 33 *H.* 6. 18. 26 *H.*6. 9. 42 *E.*3. 20. 4 *H.*4. 8. 4 *H.* 7. *cap.* 24. Plea that the Parties had nothing.

If there be two of one name, and the one levy a Fine of the Lands of the other, the other may avoid it by pleading; likewiſe the Owner of the Land may aviod the Fine levied (by a Stranger) in his name, becauſe it is a matter of Record, and there is no other remedy, except an Action of Deceipt, 34 *H.*6. 19. Two of one Name. Fine how to be avoided.

But neither Parties to Fines, nor their Heirs may plead, that before, at, and ſince the levying the Fine, the Plaintiff or their Heirs were always ſeized of the Lands in the Fine, or of parcel thereof, 27 *E.* 1. *cap.* 1. Pleas not allowable.

Tenant in Remainder in Fee, may aver the continuance of Poſſeſſion againſt a Fine, *ſur Cognizance de Droit come ceo*, &c. levied by Tenant in Tail, 12 *E.* 4. 12. Averment of him Remainder in Fee.

be-

The Reaſon. becauſe he is neither the Party nor his Heir; and ſo may a Feme-Covert where her Husband ſole levyeth the Fine, *Ibid.*

Continuance of Poſſeſſion. Iſſue in Tail may aver continuance of Poſſeſſion againſt a Fine, *ſur Cognizance de Droit tantum*, but not againſt a Fine *ſur Cognizance de Droit come ceo, que il ad de ſon done*, becauſe that Fine is executed, and the other only Executory, 12 *E.* 4. 15. & 19. 11 *H.* 4. 85.

Uſe of a Fine not declared, remains to the Cognizor. And laſtly, Note that if the uſe of a Fine be not declared before, nor after the Fine levied, it ſhall be intended to the uſe of the Cognizor and his Heirs, See *Weſt*, *Symb. Tit. Fines.*

Of Recoveries.

Recoveries are either feigned, That is, Common or True, that is, actual by Judgment.

The end and effect of a Common Recovery, is to diſcontinue and deſtroy Eſtates, Remainders and Reverſions, and to bar the former Owners thereof, *Weſt*, *part* 2. *Symb.* §. 1.

And

And it is uſed for aſſurances of Land where the Parties do agree, that one ſhall bring an Action Real againſt the other that hath the Free-hold of thoſe Lands, as though he had good Right to the Lands, and the other ſhall not make defence againſt it, but ſhall alledge that he bought theſe Lands of *A. B.* who hath warranted them to him, and prays that *A. B.* may be called to defend the Title, and *A. B.* ſhall vouch to warranty *H. H.* who is called the common Vouchee, (unleſs it be in ſpecial Caſes where ſome others are to be, and muſt be vouched thereby to cut off Remainders) which Vouchee ſhall appear as though he defended, and pray that day for defence; and after a day being given him by the Court, maketh default, and thereupon the Court is to give Judgment againſt him; which Judgment cannot be for him to loſe the Land, becauſe he hath it not, but the Party to whom he ſold it, who called him to warrant it.

The form of it.

Common Voucher.

Judgment.

There-

Therefore first the Demandant against whom there is no defence, must have Judgment to have the Land against him that he sued, who is called the Tenant; and the Tenant is to have Judgment against the first Vouchee, *&c.* And by this Devise grounded upon the strict Principles of Law, the first Tenant loseth the Land, and hath nothing for it, but it is by his own Agreement, and for the Assurance of him that buys the Land.

Tenant loseth his Land by Agreement.

The Effects of Recovery.

The Recovery bars Intails, and all Remainders and Reversions that should take place after Intails, saving where the King is the Giver of the Estate Tail, and keepeth the Reversion in himself; and then the Heir in Tail, nor the Remainder, or Reversion is barr'd by such Recovery, 23 *H.*8. *b.*

It prevaileth not where the King has the Reversion.

The Reason why the Heir, &c. is barred by such Recoveries.

The Reason why the Heirs of the Remainders and Reversions be thus barr'd, is, because in strict Law the Recompence adjudged against the Vouchee, is to go in succession of Estate, as the Land lost should have done; and then it were not reason to allow the Heir

Heir liberty to keep the Land, and alſo to have a Recompence in value, therefore he loſeth the Land, and is to truſt to the Recompence. 23 H. 8.

This ſleight was firſt invented when Intails fell out to be inconvenient, as is before declared, ſo that Men made no Conſcience to cut them off if they could find Law for it; and now by uſe theſe Recoveries are become common Aſſurances againſt Intails, and againſt Remainders, and Reverſions, and are the greateſt Aſſurances that the Purchaſors have for their Mony; for a Fine will bar the Heirs in Tail, but not the Remainders, or Reverſions; but a common Recovery bars them all. Recoveries when firſt invented. Are the greateſt Aſſurances for Purchaſors

And this common Recovery is uſed when a Man is deſirous to cut off an Eſtate Tail in Lands or Tenements; to the end, to ſell, give or bequeath it, as himſelf ſeeth good. The uſe.

There is alſo a true Recovery which is an actual or real Recovery of any Thing, or the value thereof by Judgment; for example, If a Man buy Land of another with True Recovery what.

with a Warranty, which Land a third Perſon afterward recovereth againſt him; the Buyer hath re medy againſt the Seller to recove it in value, That is, to recover ſo much in Mony as the Land i worth, *Fitz. N. B. fol.* 134.

Vouchers.

Note, That theſe common Recoveries are ſued out with ſingle, double and treble Vouchers.

What a Recovery with ſingle Voucher is.

And yet in that called a ſingle Recovery, you will find two Recoveries included; the firſt by the Demandant againſt the Tenant, and the ſecond by the Tenant againſt the common Vouchee.

What is intended by a Recovery with ſingle Voucher.

The intent of a common Recovery, with ſingle Voucher, is to bar the Tenant and his Heirs of ſuch only Eſtate Tail which then is in him, to deſtroy the Eſtates which others have of any Reverſion Expectant, or Remainder Dependant upon the ſame; and of all Leaſes and Incumbrances derived out of ſuch Reverſions or Remainders.

In

In a double Voucher there are lſo three Recoveries mentioned; ne for the Demandant againſt he Tenant, another for the Te- ant againſt the Voucher, the laſt or the firſt Voucher againſt the ommon Vouchee

What a Recovery with double Voucher is.

And by this Recovery with ouble Voucher, it is intended to ar the firſt Voucher and his Heirs f every ſuch Eſtate, as at any ime was in the ſame Voucher, or ny of his Anceſtor whoſe Heir he s of ſuch Eſtate, and all other erſons of ſuch Right to a Rever- ion or Remainder; and will be al- o a perpetual Bar of ſuch Eſtate, hereof the Tenant was then eized in Reverſion, or Remainder Expectant or Dependant upon the ame.

What is intended by double Voucher.

And of all Leaſes, Charges and Incumbrances derived out of any ſuch Reverſion or Remainder.

In a Recovery with treble oucher, are included four Reco- eries; the firſt by the Demandant gainſt the Tenant; the ſecond y the Tenant againſt the firſt ouchee; the third by the firſt gainſt the ſecond; and the fourth y the ſecond againſt the common ouchee.

What a Recovery with treble Voucher is.

The

The intent thereof.

The ſcope and intent of this treble Voucher, is to make a perpetual Bar of the Eſtates of the Tenant, and of every ſuch Eſtate of Inheritance, as at any time had been in the firſt or ſecond Vouchee, or any of them, or either of their Anceſtors, whoſe Heirs he or they are of ſuch Eſtate, and as well of every Reverſion thereupon dependant; as alſo of all Leaſes, Eſtates, Charges and Incumbrances derived out of any ſuch Reverſion or Remainder.

Indentures to lead the uſes of Fines and Recoveries.

And the uſes both of Fines and Recoveries are moſtly expreſſed and led by Indentures between the Parties deſigned, before or after for that purpoſe, which be called Indentures, to lead the uſes of Fines and Recoveries.

And as theſe Fines and Recoveries are a Bar, and dock the Eſtates afore-mentioned, ſo by theſe Indentures to lead the uſes thereof new Eſtates and Intails are limited and created, ſubject to further Fines and Recoveries, *Et ſic ad infinitum.*

Upon

Upon Feoffment, Fines and Recoveries, the Eſtate of the Lands doth ſettle, as the uſe and intents of the Parties is declared by Writing before or after the Act was done; (as for example,) If they make Writing that one of them ſhall levy a Fine, or make a Feoffment, or ſuffer a Recovery to the other; yet the uſe and intent may be, is that one ſhall hold it for his Life, and after his death a Stranger to have it in Tail, and then a third in Fee-ſimple: In this caſe the Land ſetleth in Eſtate according to the uſe and intent declared; and that by reaſon of the Statute of 27 *H.*8. *cap.* 10. Which conveyeth the Land in poſſeſſion to every one that hath intereſt in Uſe, or the intent of the Fine, Feoffment or Recovery, according to the uſe or intent of the Parties; But before that Statute the Feoffees were Owners of the Land, but now the *Ceſtuy que Uſe* (he to whoſe uſe they were enfeoffed) is the Owner of the ſame; before, the Poſſeſſion ruled the Uſe, but ſince the Uſe governeth the Poſſeſſion, *Noy Max.* 60.

The Uſe guides the Eſtate.

27 *H.*8. *cap.* 10.

The conveniency and force of that Statute.

Upon

Upon this Statute of 27 *H.* 8. is alſo grounded the fourth and fifth of theſe Conveyances, (*viz.*) Bargains and Sales, and Covenants to ſtand ſeized to Uſes.

For this Statute whereſoever it findeth, conveyeth the Poſſeſſion to the Uſe.

Uſe what.

The Uſe is but the Equity and Honeſty to hold the Land (in Conſcience of a good Man,) as for example, If I and You by Deed agree, and Covenant that I ſhall give you Mony for your Land, and that you ſhall make me Aſſurance of it: I pay you your Mony, and you have made me no Aſſurance of the Land. Here although the Eſtate of the Land be ſtill in you, yet the Equity and Honeſty to have the Land is ſtill with me; and this Equity is called the Uſe, upon which I had no remedy but in Chancery, until the Statute of 27 *H.* 8. And now this Statute conjoyning and conveying the Land to him that hath the Uſe, I for my Mony paid, have the Land it ſelf, without any other Conveyances from you; and this is called a Bargain and Sale. Tis

Uſe *quid.*

Advantage by the Statute 27 H. 8.

'Tis true, Uſes firſt began, and were invented upon the Statute called *Weſt.* 3. or *Quia emptores terrarum*, before the which Statute no Uſes were known, *Perkins Devices* 528. And becauſe Mens Wills had in time deviſed many Deceits, by the ſetling of the Poſſeſſion in one Man, and the Uſe in another, the afore-mentioned Statute of *H.*8. was made, whereby it was enacted, That the Uſe and Poſſeſſion of Lands and Poſſeſſions ſhould always ſtand united.

When Uſes firſt began.

Uſes and Poſſeſſions united

But the ſame Parliament that made that Statute, did foreſee, that it would be miſchievous, that Mens Lands ſhould be ſo ſuddenly conveyed (upon the payment of ſome little Sum of Mony) from them; and that peradventure in an Alehouſe or Tavern upon ſtrained Advantages, and ſo gravely provided another Act, at the ſame Parliament, That the Land upon this Payment of Mony ſhould not paſs away, except there were a Writing indented made between the Parties, and the ſame Writing alſo within ſix Months after to be inrolled

Bargains and Sales.

27 H. 8. 16.

Bargain and Sale muſt be in Writing, indented, ſealed and inrolled within ſix Months.

rolled in some of the Courts at *Westminster*, or in the Sessions Rolls of the Shire where the Land lieth, unless it be within Cities, and Towns Coporate where they did use to inrol Deeds, and there the Statute extendeth not; by Bargain and Sale Fee-simple passeth, tho' Heirs be omitted in the Deed; and tho' there be no Livery and Seisin made by the Seller.

The effect thereof.

Note.

No Mannor, Lands, Tenements or other Hereditaments can pass, alter, or change from one Man to another, whereby an Estate of Inheritance or Free-hold is made, or taketh effect in any Person or Persons, or any use thereof is made, by reason only of any Bargain and Sale therefore; except the same be made by Writing indented, sealed and inrolled in one of the Courts of Record at *Westminster*, or within the same Court or County where the Tenements so bargained do lie, before the *Custos Rotulorum*, and two Justices of Peace, and the Clerk of the Peace, or two of them, whereof the Clerk of the Peace to be one, and that with-

How Estates pass by Bargain and Sale.

Inrolment to be made, how and when.

within ſix Months after the date of ſuch Writing indented, *See Stat.* 27 *H.* 8. *Noys Max. page* 56, 57.

When it ſhall be intended.

The Inrolment ſhall be intended the firſt day of the Term.

Hath relation to the delivery.

And ſhall have relation to the delivery of the Deed againſt all Strangers, *Noys. Max. page* 57.

Two Bargains and Sales made of the ſame Lands to two ſeveral Perſons, who ſhall have it.

A Man by Deed Bargains and Sells his Land to one, and before the Inrolment of the Deed, ſells it another, and the laſt Deed is the firſt inroll'd; and afterwards the firſt Deed is alſo inroll'd within the ſix Months, the firſt Buyer ſhall have the Land, 2 *And.* 161. *Moor* 40, 41. 2 *Inſt.* 675. *Hob.* 165. *Dy.* 218. 4 *Co.* 71.

If the Bargainee after the Bargain, and before the Inrolment ſell the Land to another, and afterwards the Deed is duly inrolled; the Sale by the Bargainee is good, 2 *Inſt.* 675. 2 *Cr.* 52. 1 *Cro.* 218. 110. *Rol.* 424. 1 *Inſt.* 186.

Nota, The Buyer of a Reverſion on Life, or Leaſe for Years, ſhall have the Rent upon the firſt Leaſe without

Attornment or Inrolment, 8 *Co.*93. *V. Plow.*421. *Jon.*206. 2 *Inſt.*672. 6 *Co.* 68. 3 *Cro.* 166.

Covenants to ſtand ſeized to Uſes.

Covenants to ſtand ſeized to uſes how.

A Covenant to ſtand ſeized to uſes, is in this ſort. A Man that hath a Wife and Children, Brothers and Kinsfolks, may by Writing under his Hand and Seal agree, That for their, or any of their Preferment, he will ſtand ſeized of Land to their uſe, either for Life, in Tail or Fee-ſimple, as he ſhall think fit or ſee cauſe.

The Uſe how ariſeth.

Upon which Agreement in Writing there ariſeth an Equity or Honeſty, that the Land ſhall go according to his Agreement. Nature and Reaſon requiring and allowing theſe Proviſions, of which Equity and Honeſty is the Uſe.

How the Eſtate ſetleth.

And the Uſe being created in this ſort, the Statute of 27 *Hen.* 8. before-mentioned, conveyeth the Eſtate of the Land as the Uſe is appointed; and ſo this Covenant to ſtand ſeized, ſince the ſaid Statute is a Conveyance of the Land.

But

But this differeth from a Bargain and Sale, in that this needeth no Inrolment, as that doth, neither is tied to be in Writing, indented as the Bargain and Sale muſt.

How Covenants to ſtand ſeized, differ from Bargains and Sales.

And if the Party to whoſe uſe he agreeth to ſtand ſeized of the Land, be not Wife, Child, Uncle or Couſin, or one that he intendeth to marry, then will no Uſe ariſe, and ſo no Conveyance; for although the Law allow theſe weighty Conſiderations of Marriage and Blood to raiſe Uſes, yet doth it not ſo of trifling Conſiderations; as of Old Acquaintance, Schooling, Service and the like, 1 *Co.*176. 2 *Co.*15,76. *Moor* 504.*con.* 3 *Cro.*394. *Moor* 102.

Conſiderations to raiſe Uſes.

Muſt not be trifling.

But where a Man maketh an Eſtate of his Land to others, by Fine, Feoffment or Recovery, he may then appoint the Uſe to whom he liſteth, without reſpect of Kindred, Marriage, Mony or other Thing; for in that caſe his own Will and Declaration guideth the Equity of the Eſtate, *Ibid.*

Upon a Fine, Feoffment or Recovery, a Man may limit the Uſe.

It is not ſo when he maketh no Eſtate, but agreeth to ſtand ſeized; nor in Bargain and Sale when he hath taken any thing.

Note, The Statute 29 *Car.* 2. to prevent Frauds, *&c.* Enacts, *That all Declarations, or Creations of Truſts of Lands or Hereditaments, muſt be declared in Writing, or by Will in Writing, or elſe void; except Truſts ariſing by Implication of Law, which ſhall be of the ſame effect, as if the Statute had not been.*

Alſo all Grants and Aſſignments of Truſts, muſt be in Writing, ſigned by the Party, granting or aſſigning by his laſt Will or Deviſe, or elſe to be void.

Covenant to raiſe an Uſe.

If a Man Covenant with his Brother, and two Strangers in conſideration of the Love to his Wife and Children, their Preferment and Living, and to ſettle his Lands in his Name and Blood, to ſtand ſeized of the Lands, to the uſe of himſelf for Life; and after his deceaſe, to the uſe of his Wife; and after her deceaſe, to the uſe of the Covenantees,

nantees, and their Heirs upon Truſt, *&c.* No Uſe ariſeth to theſe other Covenantees, but only to the Brother, becauſe they are Strangers to the Conſideration, 1 *Cro.* 529. *Jon.* 418. *Plow.* 307. *Yelv.* 51.

No Uſe ariſeth to them that are Strangers to the Conſideration.

In conſideration that the Land ſhall remain in his Name, *&c.* And the Uſe is limited to the King to preſerve the Tail: it will not raiſe an Uſe to the King, 2 *Co.* 15.

No not to the King.

What this Uſe is, and when firſt began, and how united to the Poſſeſſion, you have read immediately before.

Gift or Grant.

The ſix Conveyances before treated are the Chief, and of greateſt moment, and moſt largely to be treated; the next Conveyance in order propoſed, is a Gift or Grant, which differs from a Feoffment; as is before explain'd.

A Grant what.

A Grant *Conceſſio*, as Mr. *Weſt* ſaith in his *Symb. part* 1. *Lib.* 2. §. 290. ſignifieth permiſſion, ſufferance, leave, licence, yielding or giving over of a Thing; but eſpecially

taken it ſignifieth a Gift in Writing of ſuch Things as cannot aptly paſs by Word only without Writing; as Rents, Reverſions, Services, Advowſons in Groſs, Common in Groſs, Tithes, *&c.* or made by ſuch Perſons as cannot give but by Deed; as the King, and all Bodies Politick; as Mayors and Commonalities, Deans, Chapters, *&c.* which Differences be oftentimes neglected, and then it is taken generally to ſignifie every Gift whatſoever, made of any Thing, by any Perſon whatſoever; and he that granteth or giveth, is term'd the Grantor or Donor; and he to whom the Grant or Gift is made, the Grantee or Donee.

The general ſignification.

An Inſtrument of Grant, is a Deed containing the Deſcription of ſuch a Gift or Grant.

Attornment neceſſary in Grants.

And note, That Lands and Tenements, and ſuch things as naturally lie in Grant, cannot be tranſferred from one to another by bare Grants of the Parties, without the Attornment and Agreement of others; the Nature and Effect whereof is after laid down.

Note,

Note, A Grant muſt be certain, *Noys Max. p.* 61. Certainty.

A Man cannot charge or grant that which he never had, *Ibid. p.* 62.

A Thing that cannot begin without a Deed, may not be granted without a Deed; and every Thing that is not given by delivery of Hands, muſt be paſſed by Deed, *Ibid.* Things beginning by Deed, how they muſt be granted.

All Things that are incident to others, paſs by the Grant of them that they are incident unto, *Ibid.* Incident.

A Man by his Grant cannot prejudice him that hath an elder Title, *Ibid.* 63. No prejudice to an elder Title.

If no Eſtate be expreſſed in the Grant, and though Livery and Seiſin be made, yet the Grantee hath but an Eſtate for Life, *Ibid.* How the Eſtate ſhall be limited.

But if the words manifeſt the lawful Will of the Grantor, the Eſtate ſhall be taken according to his intent, *Ibid.*

All Grants ſhall have a reaſonable Conſtruction, and taken ſtrongeſt againſt him that made them, and moſt beneficial to him to whom they are made, *Ibid.* The Conſtruction of Grants.

Attornment. There must be Attornment to Grants of Reversion or Rents, otherwise nothing passeth, except it be by matter of Record, *Ibid.*

Lease for Years.

Lease for Years. The next of these Conveyances is a Lease for Years; and he that letteth is called the Lessor, and he that taketh by the Lease is termed Lessee.

Certainty thereof. A Lease for Years must be for time certain, and ought to express the Term, and when it should begin, and when it should end certainly; And therefore a Lease for a Year, and so from Year to Year during the Life of *J. S.* is for two Years, *Noys Max. p.* 65.

It may be made by Word or Writing as before.

Lease at will. A Lease from Year to Year, so long as both the Parties please, after entry in any Year, it is a Lease for that Year, *&c.* till warning be given to depart, 14 *H.*8.16. *Noy, Ibid.*

A

A Leaſe beginning from henceforth, ſhall be accounted from the day of the delivery, *Ibid.* How they ſhall commence.

From the making ſhall be taken inclusive from the day of the making, or of the date excluſive, *Ibid.* From the making.

If the *Habendum* of a Leaſe be for Term of one and twenty Years, without mentioning when it ſhall begin; it ſhall then begin from the delivery, *Co. Lit. fol.* 46. *Herns Law of Conveyances, p.* 15. & 131. From the delivery.

If Lands deſcend to the Heir before his Entry, he may make a Leaſe thereof, *Noys Max. p.* 65. Leaſe made by Heir before Entry.

Tenant for Term of Years may enter when he will, the death of the Leſſor is no let, and he may grant away his Term before it begin, *Noys Max. p.* 30. When the Tenant may enter.

But before he enter he cannot ſurrender, nor have any Action of Treſpaſs, nor take a Releaſe, *Ibid.* When ſurrender.

He is bound to repair the Tenements. Repairs.

And if Tenant for Life or Years, granteth a greater Eſtate than he hath himſelf, he doth forfeit his Term, *Ibid.* Term forfeited.

Nota,

View of Reparations and Distress.

Nota, *The Lessor may enter to see what Reparations or Waste there is, and he may distrain for his Rent, or have an Action of Debt.* Ibid.

The nature of Leases.

And note also, That Leases for Life or Years are of three Natures; some be good in Law; some voidable by Entry; and some void without; some in *futuro*, and some in *præsenti*, of all which, and of the Dates, Commencements, *Habendums*, continuance and determination of Leases; you may find many Examples in a Treatise, for that purposed collected, called *Landlords Law*, *p.* 137. &c.

See more of the before, *Ch.* 1.

Of a Release.

Release defined.

A Release is an Instrument whereby Estates, Rights, Titles, Entries, Actions and other Things be sometimes extinguished; sometimes transferred; sometimes abridged, and sometimes inlarged, *West*, *Symb. part* 1. *Lib.* 2. §. 466.

A

A Releaſe made after a Leaſe for Life or Years, amounteth to a Feoffment; as if I let Land to a Man for Years or Life, and after releaſe to him all my Right in the Land, to have and to hold to him and his Heirs, hereby he hath a Fee-ſimple, *Co. Lit. f.* 207. *a. Finch L.* 1. *c.* 5. *pag.* 67. *Dyer* 263. It amounteth to a Feoffment. Example.

But if I Releaſe to him all my Right which I have in the Land, without uſing any Words in the Releaſe, then here he hath only an Eſtate for Life, *Ibid.* Words to be obſerved.

And note, That a Releaſe is the giving or diſcharging a Right or Action which a Man hath, or claimeth againſt another, or out of, or in his Lands, *Noys Max. pa.* 74.

And a Man may not releaſe upon a Condition, nor for time, nor for part; but either the Condition is void, and the time is void, and the Releaſe ſhall enure to the Party to whom it is made for ever for the whole, by way of Extinguiſhment, *Ibid. p.* 57. But ſuch Releaſe by Deed indented is good, *Ibid.* How a Releaſe ſhall enure.

Words to be observed. A Releaſe to charge an Eſtate ought to have theſe words, (Heirs) or words to ſhew what Eſtate he ſhall have, *Ibid.*

Void Releaſe. A Releaſe made by him, that at the time of the making thereof had no Right, is void, *Ibid. page* 74.

Void Releaſe. And a Releaſe made to him, that at the time of the Releaſe had nothing in the Lands, is alſo void; it behoveth him to have a Freehold, or a Poſſeſſion or Privity, *Ibid. p.* 75.

The common Courſe of paſſing Land by Leaſe and Releaſe. For which purpoſe it is now the courſe in paſſing Land by Leaſe and Releaſe; firſt to execute a Leaſe for a Year, or the like Term, to the intent and purpoſe that the Leſſee may be in the actual poſſeſſion of the Lands intended to be releaſed, and thereby, and by force and vertue of the Statute 27 *Hen.* 8. for transferring Uſes into Poſſeſſion, be enabled to take a Grant or Releaſe of the Reverſion, and Inheritance of the ſaid Land, to the uſe of him and his Heirs.

A

A Releaſe made to him that hath a Reverſion, or a Remainder in Deed, ſhall ſerve and help him that hath the Franktenement; ſo ſhall a Releaſe made to a Tenant for Life, or a Tenant in Tail, inure to him in the Reverſion or Remainder, if they ſhew it; and ſo to Treſpaſſors and Feoffors, but not to the Diſſeiſors, *Noys Max. p. 76. quod bene nota.*

Where it helpeth the Free-hold.

How it ſhall inure.

Nota, Mr. *Noy* here by Franktenement means him that hath Fee-ſimple; yet a Man is ſaid to have Free-hold if he holdeth either in Fee, Fee-Tail, or for Term of Life, *Bract. Lib. 2. cap. 9. Toe new Law Terms, Tit. eod. Brit. cap.* 32. ſaith, Franktenement is a Poſſeſſion of the Soil, or Services iſſuing out of the Soil, which a Free-Man holdeth in Fee, to him and his Heirs, or at the leaſt, for the Term of his Life, See *Cow. Interp. Tit. Free-hold.*

Aſſign-

Assignment.

Defined. Assignment is the appointing or setting over a Right unto another.

Assignee in Deed and Law. And there is an Assignee in Deed, and an Assignee in Law:

In Deed. he in Deed is such a one as to whom a Lease, Estate or Interest is assigned.

In Law. He in Law, is he whom the Law so maketh without any appointment; as an Executor is an Assignee in Law, *Vide Dyer fol. 6. nu. 5.*

Assignee and Deputee the difference. The difference betwixt an Assignee and Deputee is said to be, for that the Assignee occupieth in his own Right, the Deputee in the Right of another, *Vide Perkins in Grants.*

Executors not charged. If the Lessee for Years assign over his Term, and die, his Executors shall not be charged for Rent due after his death, *Noy Max. 71.*

And if the Executors or Administrators of a Lessee for Years assign over their Interest, an Action of Debt doth not lie against them for

for Rent; yet it ſeemeth that the Leſſor muſt have notice of the Aſſignment, and conſent to it, *Noy* 71. See *Moor Rep. Marrow* and *Turpins* Caſe, and 3 *Co. Walkers* Caſe. Notice of Aſſignment.

If a Leſſee for Years aſſign over his Term, the Leſſor may charge which of them he will; but if he accept the Rent from the Aſſignee (knowing of the Aſſignment) he hath determined his Election, and cannot afterward bring an Action of Debt againſt the Leſſee for Rent due after the Aſſignment, *Co.* 3. *Rep. fol.* 24. *Bulſtr.* 2 *part* 151. *Herns Law of Convey. p.* 110. Aceeptance of Rent. Barreth.

If the Leſſor grant away the Reverſion after the Aſſignment of the Leſſee; in this caſe the Grantee cannot have an Action againſt the Leſſee for the Rent, becauſe there is no privity between them; but he is left to his remedy againſt the Aſſignee, *Poph. Rep.* 55. *Brownlows part p.* 56. Privity between the Parties.

An Aſſignee of Lands, if he be not named in the Condition, yet he may pay the Mony to ſave his Land, *Noys Max. p.* 72. Aſſignee may pay Mony to ſave the Land.

But

He shall not receive.

But he shall receive none if he be not named, and the Tender shall be to the Executor of the Feoffees, *Ibid.*

Who shall be intended an Assignee.

Assignee shall always be intended, he that hath the whole Estate of the Assignor, that is assignable; and if there be an Assignee in Deed, an Assignee in Law will not be allowed, *Noy*, *Ibid.*

In Assignments it is necessary to have Covenants of the Assignors part, to save harmless of former Rents, Grants and Charges, and for the delivery of former Deeds, that he is Owner in Possession, and hath power to grant and assign, *&c.* That the Assignee may quietly enjoy, *&c.* and to make further assurance, *&c.*

And on the Assignees part, to pay the Rents, and perform the Covenants, &c. *West*, *part* 1. *Lib.* 2. §. 453. But this may be done by Bond.

Exchange.

Exchange *permutatio*, Mr. *West* in his *Symb. part* 1. *Lib.* 1. *sect.* 33. saith, Permutation or Exchange, is a nameless Contract, consisting in the thing and consent, by which one certain thing is given, and exchanged for another; and albeit, it counterfeits Buying and Selling very near, yet because it cannot be discerned thereby, whether is the Buyer, and whether the Seller, it cannot usurp that Title. Exchange what.

In Exchange both the Estates must be equal; there must be two Grants, and in every Grant mention must be made of this word (Exchange,) *Noys Max. p.* 60. Estates must be equal.

It may be done without Livery of Seisin, if it be in one Shire, or else it must be done by Indenture, and by this word (Exchange,) or else nothing passeth without Livery, *Ibid. p.* 61. Without Livery of Seisin.

Exchange importeth in the Law Condition of Re-entry, and a Warranty, Voucher and Recompence of the other Land that was given Importeth Re-entry.

given in Exchange: An Exchanger may re-enter upon an Aſſignee. *Ibid.*

Surrender.

Defined. Surrender is an Inſtrument teſtifying with apt words, that the particular Tenant, *i. e.* Tenant for Life or Years, of Lands or Tenements, doth ſufficiently conſent That he which hath the next mediate Remainder or Reverſion thereof, ſhall alſo have the particular Eſtate of the ſame in Poſſeſſion, and that he yieldeth or giveth the ſame to him: For every Surrender ought forthwith to give a preſent poſſeſſion of the thing ſurrendred unto him which hath ſuch an Eſtate, where it may be drown'd. *Weſt, Symb. part* 1. *Lib.* 2. *ſect.* 460. *Noys Max. p.* 73.

Two ſorts. And there are two manners of Surrenders, *viz.* A Surrender in Deed, and a Surrender in Law:

In Deed. Now a Surrender in Deed, is that which is really performed, as by Writing; and alſo when the words of the Leſſee to the Leſſor prove

a ſufficient aſſent, that he ſhall have again the thing which he holdeth of his Leſſor (if the Leſſor do agree to it,) it amounts to a Surrender in Deed, *Perkins ſect.* 606,607,608. 6 *E.*3. 7.

In Law.

A Surrender in Law, is in intendment of Law, by way of conſequent, and not actual; as if a Man have a Leaſe of a Farm, and during the Term, he accept of a new Leaſe; this Act is a Surrender in Law of the former Leaſe, *Perk. ibid.* 6 *Co. fol.* 11. *b.*

Agreement, or diſagreement.

And note, The Leſſee cannot ſurrender to his Leſſor againſt his will; but if he to whom the Surrender is made, once agree to it, he cannot afterwards diſagree thereunto, *Perk. ibid.*

Example.

As if the Leſſee for Life or Years of Land ſay, that his will is, that his Leſſor ſhall enter into the Land which he holdeth of him, and ſhall have the ſame again, if the Leſſor agreeth thereunto, and by force thereof entreth; this is a good Surrender, *Ibid.*

And

A good Surrender.

Note, a Surrender in Deed must have sufficient words to prove assent and agreement.

And if the Lessee cometh and saith unto his Lessor, That he will occupy the Lands no longer, and the Lessor by force thereof doth enter; this is a good Surrender, for the Agreement and Entry hath confirm'd it, and so of the like, *Perk.* 109. *Herns Law of Con. p.* 76.

Husband surrendreth Wives Dower.

If a Woman being Tenant in Dower, taketh a Husband who surrendreth the Land which he holdeth for her life, and in her Right after his death she may enter, though she had joyn'd in the Surrender and notwithstanding that, he to whom the Surrender was made died seized of the Land in Fee and his Heir be in by descent *Perkins sect.* 112.

She is not bound.

She shall be bound.

But if a Feme-sole who is Lessee for Years of House or Land, taketh a Husband who surrendreth, and dieth before the Years are out here she shall be bound by this Surrender, *Ibid. sect.* 113.

Good Surrender.

And if Tenant in Dower of Land granteth her Estate unto him in the Reversion, this is a Surrender *Ibid.* 623.

If one hold Lands for Life, the Remainder to a Stranger for Years; and if the Leſſee for Life ſurrendreth unto him in Remainder, it ſhall not take effect, becauſe that an Eſtate for Life cannot drown in an Eſtate for Years, *Perkins ſect.* 589. How ſurrender taketh effect.

If a Copyholder for Life ſurrender to the uſe of another, who is admitted, by this the Copyholders Eſtate is clearly determined. Eſtate determined.

But if a Copyholder in Fee ſurrender to the uſe of another for Life, after his Death he ſhall have it again, 1 *Cro.* 148. Revived.

A Joynt-Tenant cannot ſurrender to his Fellow, *Noys Max.* 73. Joynt-Tenant.

Leſſee for Years cannot ſurrender before his Term begin, (though he may grant,) alſo he cannot ſurrender part of his Leaſe, *Ibid.* Leſſee for Years.

The Husband may ſurrender the Wifes Dower for his Life, (as before) and her Leaſe he may ſurrender for ever, *Noy* 74. Husbands ſurrender of his Wifes Eſtate.

Note, That thoſe things which cannot take effect without Deed, cannot be ſurrendred without Deed, except in ſome ſpecial Caſes. How it effecteth.

And

By Deed.

And therefore if a Man ſeized of Rents, Tithe, Common, *&c.* granteth the ſame for Life or Years, the Grantee cannot ſurrender them without Deed, *Perk. ſect.* 581, 582, 584.

Surrender of Deed.

But that thoſe things that may not be granted without Deed, may be determined by the ſurrender of the Deed to the Tenant of the Land, *Noys Max. p.* 73.

Confirmation.

Defined.

Confirmation is a ſtrengthening and making good of an Eſtate formerly had, and yet voidable or defeaſible, though not preſently void by him which hath a better or longer Eſtate in the thing granted, than the Tenant thereof hath, *Lit. ſect.* 522. *Weſt page* 1. *Lib.* 2. *ſect.* 457.

And it is made by the words (have ratified, approved and confirmed, *& ſimilia.*)

Defined.

Noy in his *Max.* ſaith, Confirmation is when one ratifieth the Poſſeſſion, as by Deed, to make his Poſſeſſion perfect, or to diſcharge his

his Eſtate that may be defeated by anothers Entry, *Noys Max. p.*76.

Landlord and Tenant *p.*106.ſaith, A Confirmation is the Conveyance of an Eſtate or Right that one hath unto Lands or Tenements to another that hath the Poſſeſſion thereof, or ſome Eſtate therein, whereby a voidable Eſtate is made ſure and unavoidable; or whereby a particular Eſtate is increaſed and inlarged; and though ſometimes it may paſs by the words *dedi & conceſſi*, yet the moſt proper words are, *confirmavi, ratificavi & approbavi*, which do ſignifie *ratum & firmum facere & ſupplere omne defectum*; and he that makes the Confirmation is called the Confirmer, and he to whom 'tis made the Confirmee, *Co. Lit.* 295. *Bract.* 1. *Lib.* 2. 8. Defined.

And there are two kinds of Confirmation, Confirmation in Deed, the other implied by Law. Confirmation by Deed, is when the Act done, or Deed made, is intended for a Confirmation. Confirmation implied, is when the Law by conſtruction makes a Confirma- Two ſorts of Confirmations Implied.

tion of a Deed made to another purpoſe, and both theſe are always in Writing, *Co. Rep. 9. fol.* 142. *Co. Lit. fol.* 295. *Shephards Touch-ſtone C.* 18. *p.* 311.

Where it effecteth. If a Tenant for Life will grant a Rent-charge in Fee, then he in the Reverſion may confirm the ſame Grant; where a Man by his Entry may defeat an Eſtate there by his Deed of Confirmation he may make the Eſtate good, *Noy Max.* 77.

The words. A Confirmation to charge an Eſtate, muſt have words to ſhew what Eſtate he ſhall have, *Ibid.*

Cannot effect. A Confirmation cannot charge an Eſtate that is determined by expreſs Condition or Limitation *Ibid.*

For an hour good for Life. Confirmation to Tenant for Life of his Eſtate only for an hour ſhall be good for Life; and ſo if made to a Tenant in Fee, it ſhall be good for ever, *Ibid.*

Upon Condition. A Leaſe for Years may be confirmed for a Time, or upon Condition, or for a piece of the Land *Ibid.*

But if a Franktenement be as afore, it ſhall enure to the whole abſolutely, *Noy*, *Ibid.*

To confirm the Eſtate of Tenant for Life to his Heirs, cannot be but by *Habendum* the Land to him and his Heirs; and therefore it is good to have ſuch an *Habendum* in all Confirmations, *Ibid.* Word Heirs to be obſerved

In a Confirmation new Service may not be reſerved, and old may be abridged, *Ibid.*

Confirmation hath relation to releaſe, and where he that (as before) hath a better Title in the Land than the Tenant, releaſeth to the Tenant; this is a Confirmation, *Weſt*, *pa.*1. *Lib.*2. *ſect.*457.

A Confirmation made by him, that at the time of the making thereof had no Right, is void, *Noys Max. p.*74.

And ſo if a Right come to him afterwards, (unleſs it be with Warranty) and then it ſhall bar him of all Right that ſhall come to him after the Warranty made, *Ibid.*

Where voidable.

But note, A Confirmation made to one Diſſeiſor, ſhall be voidable to the other, ſo ſhall not a Releaſe, *Ibid. p.* 77.

Where neceſſary.

Note, That if the King for him and his Heirs grants *Catalla felon' & fugitivorum*, or the like, which is in grant, and dies, the Grantee needs no Confirmation of the new King; but if it be a Fair or Market, or the like, and it is abuſed or miſuſed, as it may be; or if it be a judicial or miniſterial Office or Power, as to be a Juſtice of Peace, Eſcheator, or the like, there he ought to have a Confirmation of the new King, See *Brooks Tit. Confirmation* 19 & 29. 1 *R.*3.4.

Eſtate to be recited.

In a Confirmation it is not amiſs in the Premiſſes of the Deed ſpecially to recite the Eſtate of the Tenant which muſt be confirmed, and alſo the Eſtate of him that ſhall confirm, and to expreſs the Conſideration thereof, if any ſuch be, *Weſt, Symb. part* 1. *Lib.* 2 *ſect.* 457.

Revocation and New Declaration.

This ſeems to be dependant upon ſome former Deed or Conveyance, being a Reſervation by Covenant to revoke a Precedent, and by Declaration to create a new Eſtate of the Lands; after which the Lands ſettle accordingly.

Will.

The laſt of theſe Conveyances is a Will in Writing, which courſe of Conveyance was firſt ordained, by a Statute made the 23 of *H.*8.1. before which Statute no Man might give Land by Will, except it lay in ſome Burrough-Town, where there was a ſpecial Cuſtom, That Men might give their Lands by Will; as it is in *London* and many other Places. Wills in Writing. When firſt of force.

The not giving of Lands by Will, was thought to be a defect by the Common Law, that Men in the Wars, or ſuddenly falling Sick had not power to diſpoſe of their Land, except they would make a Feoffment, The Reaſon.

ment, levy a Fine, or ſuffer a Recovery, which lack of time would not permit; And for Men to do it by thoſe means, ſo as they could not undo it again, was thought hard; beſides even to the laſt hour of Life, Mens Minds might alter, upon further proof of their Children or Kindred; or by encreaſe of Children; or for Debt; or for defect of Servants or Friends.

For lack of Wills, Men uſed the following Device

For which cauſe it was thought reaſon that the Law ſhould permit him to reſerve to the laſt inſtant, the diſpoſition of his Land, and yet then alſo to give him a means to diſpoſe of it how he pleaſed, which ſeeing it did not, Men uſed this Device following:

The Device.

They conveyed the full Eſtate in their Lands in their good Health, to Friends in Truſt, (called properly Feoffees in Truſt,) and then they declared by their Wills, how theſe Friends ſhould diſpoſe of their Lands, and if thoſe Friends would not perform it, the Court of Chancery was to compel them by reaſon of the Truſt; and this Truſt was called the uſe of the Land,

A Feoffment in truſt to Friends.

Who were compelled to Perform it.

ſo

ſo as the Feoffees had the Land, and the Party himſelf had the Uſe, which Uſe was an Equity to take the Profits himſelf, and that the Feoffees ſhould make ſuch Eſtates as he ſhould appoint them; and if he appointed none, then the Uſe was to go to the Heir, as the Eſtate it ſelf of the Land ſhould have done; for the Uſe was to the Eſtate, like to the Shadow following the Body; But obſerve that by this courſe of putting Lands in Uſe, there were many inconveniencies; for this Uſe that firſt grew of a reaſonable Cauſe, to give Men liberty to diſpoſe their own, was turn'd to defraud many other juſt and reaſonable Rights, as namely, A Man that had cauſe to ſue for his Land, knew not againſt whom to bring his Action, nor who was Owner of it; the Wife was defrauded of her Dower; the Huſband of being Tenant by the Courteſie; the Lord of his Wardſhip, Heriot and Eſcheat; the Creditor of his extent for his Debt; the poor Tenant of his Leaſe, for the

Many Inconveniencies grew thereby, as a Man knew not againſt whom to bring his Action.

The Wife defrauded,
Husband defrauded,
Lord defrauded,
Creditor defrauded,
Tenant defrauded.

the Rights and Duties were given from him that was Owner of the Land, and another (who was not the old Owner, whom we call the Feoffor) but *Ceſtuy que Uſe*, he to whoſe uſe the Feoffment was made, ſhould take the Profits, and have power to diſpoſe the Land by his direction to the Feoffees; and yet he was not ſuch a Tenant, nor ſo ſeized of the Land, as that his Wife could have Dower, or the Land be extended for his Debts, or that he could forfeit it for Treaſon, or that his Heir could be in Ward for it, or any Tenure or Duty fall to the Lord by his Death, or that he could make any Leaſe of it.

And *Ceſtuy que uſe* took the Profits, whoſe Eſtate was not liable to Dower, Debts or Forfeiture for Treaſon.

Ceſtuy que uſe could not be in Ward, or make Leaſes.

Which Frauds, as by Degrees of times they increaſed, were remedied by many Statutes, as namely by the Statute of 1 *H.* 7. 1. it was appointed that the Action might be brought againſt him that took the Profits, which was the *Ceſtuy que Uſe*, he to whoſe uſe the Feoffment was made; which Frauds nevertheleſs daily multiplying, in the end, the Parliament of 27 *H.* 8. pur-

The Frauds partly remedied by 1 *R.*3. 4 *H.*7. 16 *H.*8. Action againſt him that took the Profits.

Frauds yet increaſed.

purpoſing to take away all the Uſes, and to reduce the Laws to the ancient form of conveying Lands by publick Livery and Seiſin, Fine or Recovery, did ordain that when Lands were put in Truſt or Uſe, there the Poſſeſſion and Eſtate ſhould be preſently carried out of the Friend in Truſt, and ſetled and veſted in him that had the Uſe, for ſuch term and time as he had the Uſe, See the Statute.

Another remedy.

To carry the Eſtate from the Friends in Truſt preſently to *ceſtuy que uſe*, and ſo this device ended.

And by this Statute of 27 *H.* 8. the power of diſpoſing Lands by Will was clean taken away amongſt theſe Friends, and ſo this Statute did as it were *diſpendere juſtum cum impio*, take away what might ſeem reaſonable, by a means leſs reaſonable.

The Remedy worſe than the diſeaſe, and therefore

Whereupon in the 32 of *H.* 8. Another Statute was made to give Men power to give Land by Will, which took away many Inconveniencies.

I. Wills in Writing began.

But this Statute was limited by many particulars, as to be ſeized in Fee-ſimple, to be wholly ſeized and not joyntly, with reſtraint to Lands held in *Capite* by Knight-

Were limited.

Were remedied.

Service of the King, that a third of the whole ſhould deſcend to the Heir, to anſwer Wardſhip, Livery and Primer Seiſin to the Crown: But by Statute 12. *Car.* 2. *Cap.* 24. All Wardſhips, Tenures in Capite, Livery and Primer Seiſins, and other Dependences were taken away, and the Act 32 *H.* 8. *cap.* 6. & 33 *H.* 8. *cap.* 22. repealed.

How the Will muſt be ſigned and ſubſcribed

And by the Statute 29 *Car.* 2. For prevention of Frauds, declares that all deviſes of Lands or Tenements deviſeable either by the Statute of Wills, or by force of the Cuſtom of *Kent*, or of the Cuſtom of any Burrough, or any other particular Cuſtom, ſhall be in Writing, ſigned by the Deviſor, or ſome in his preſence by expreſs directions, and ſubſcribed in his preſence by three or four credible Witneſſes, or elſe to be utterly void, *See the Statute.*

Deviſe in Writing revocable by Writing only.

This Clauſe does not ſay the Witneſſes ſhall ſubſcribe

And further, That no Deviſe in Writing ſhall be revocable, but by ſome other Will or Writing declaring the ſame, or by burning, cancelling, tearing or obliterating the ſame by the Teſtator himſelf,

ſelf, or by his directions, and conſent in his preſence, the Writing to be ſigned in the preſence of three or four Witneſſes, declaring the ſame, *See the Statute.*

The Heir of *Ceſtuy que Truſt* chargeable for Aſſets.

That if any *Ceſtuy que Truſt* die leaving a Truſt in Fee-ſimple to deſcend to his Heir, ſuch Truſt ſhall be Aſſets by deſcent, and the Heir chargeable as fully as if the Eſtate in Law had deſcended in Poſſeſſion, in like manner as the Truſt, *See the Statute.*

But only of that Eſtate.

Provided that the Heir by reaſon of any Plea, or confeſſion of the Action, or ſuffering Judgment, be not chargeable to pay the Condemnation out of his own Eſtate, but out of the Eſtate ſo made Aſſets, in whoſe hands ſoever it ſhall come after the Writ purchaſed, *See the Statute.*

Will in Writing of a perſonal Eſtate not alterable by word of Mouth, except put in Writing in the Teſtators Life, &c.

That no Will in Writing, concerning any Goods or Chattels, or perſonal Eſtate ſhall be repealed; nor any Clauſe, Deviſe or Bequeſt therein altered or changed, by any other Will made by word of Mouth only, except the ſame be committed to writing in the Teſtators

tors Life, and read to him, and allowed by him, and proved to be ſo done by three Witneſſes at the leaſt, *See the Statute.*

Note.

There are alſo two ſorts of Wills, Written, and Nuncupative.

Written Wills be ſuch as I have afore treated, by which kind Lands and Tenements paſs, for Lands paſs not but by Writing.

A Nuncupative Teſtament, is when the Teſtator doth by Word without Writing declare his Will before a ſufficient number of Witneſſes of his Chattels only, it may for the better continuance after the making, be put in Writing and Proved; but it is ſtill a Teſtament Nuncupative, *Weſts Symb. part 1. Lib. 2. ſect.* 640.

Note, That by the Statute 29 *Car.* 2. Where the Eſtate given by Nuncupative Will exceeds 30 *l.* it is not to be good, except made in the preſence of three Witneſſes, bid to bear witneſs by the Teſtator in his laſt Sickneſs in his own Houſe, or where he had reſided ten

days

days, unleſs ſurpriſed by Sickneſs from home. And it muſt be proved within ſix months, unleſs committed to writing in ſix days.

In a Will of Goods there muſt be an Executor named, otherwiſe of Lands; for by the Doctors of the Civil Law, and Serjeants of the Common Law, if a Man makes his Teſtament, and names no Executors, this is no Teſtament, but yet tis a good Will of the Land in it, for thoſe are not Teſtamentary; but in the firſt where Executors want, yet the Legacies ſhall be paid; but if it appears that he made part of the Teſtament, and not the whole, there the Legacies ſhall not be paid. And where a Man makes a Teſtament and Executors, and they refuſe, yet the Legacies ſhall be paid, for there is no default in the Teſtator; and the Teſtament ſhall be annexed to Letters of Adminiſtration, 37 *H.*8. *B. Teſt.*20.

*5 M.1.Com.*185 No Executor, no Teſtament, yet a good Will of Land.

Legacies ſhall be paid.

A Boy after the Age of fourteen, and a Maid after her Age of twelve may make a Will of their Goods and Chattels by the Civil Law.

Who may make Wills.

Perſons

Who may be Witneſſes to Wills.

Perſons having power to make Teſtaments, and void of all natural and civil Imperfections which may impeach their Teſtimony, may be Witneſſes to Wills and Teſtaments, and there muſt be three or four at the leaſt preſent at the ſealing, ſigning, publiſhing and declaring, and the Teſtator in preſence at their teſtifying, *&c.* See *Wentworths Office of Executor*, and *Meriton of Wills*, where you may read many more things at large.

CHAP.

CHAP. III.

Shewing the Forms and orderly Parts which ought to be observed in Deeds or written Instruments.

AND thus I have led you through the Nature and Effect of such Deeds by which Lands usually pass.

Next I shall treat of the Forms and orderly Parts which ought to be observed in such Deeds or written Instruments.

And as to the Forms.

Deeds or written Instruments are either Indented or Poll.

Indented Deeds are such as are cut at the top, one into the other, beginning thus, viz. This Indenture, &c. And they do consist of two parts, three parts, four parts, five parts, or Indentures. Their Parts.

or of as many parts as ſhall be needful, and be termed Indentures *Bipartite*, *Tripartite*, *Quadripartite*, *Quinquepartite*, &c. In which it is expreſſed that the parties to the ſame Deed, have to every part thereof interchangeably ſet their ſeveral Hands and Seals, and are moſt uſually made in the third Perſon, yet may be made in the firſt Perſon; as,

Indentures in the firſt Perſon.

To all Chriſtian People to whom this preſent Writing (Charter or Letters) *indented ſhall come:* I A. B. *of* C. *&c. ſend greeting: Know ye, That I the ſaid* A. B. *have given, granted and by this my preſent Writing* (Charter or Letters) *indented, confirmed unto* C. D. *&c. twenty Acres of Land,* &c. *To have and to hold,* &c. *In witneſs whereof as well I the ſaid* A. B. *as the ſaid* C. D. *to theſe Indentures our Seals interchangeably have ſet, Dated,* &c.

Or thus:

In witneſs whereof to one part of this preſent Indenture I have ſet my Hand and Seal, and to the other part of the ſaid Indenture, the ſaid C. D. *hath*

hath ſet his Hand and Seal, Dated, &c.

And note, That this Indenture of the firſt Perſon may be *Bipartite, Tripartite, Quadrupartite, Quinquepartite,* &c. as in a Gift in general Tail, with Remainders over, *viz.* In witneſs whereof to two parts (or more, as the Remainders are limited) of this my preſent Charter tripartite indented remaining with the ſaid *C. D.* and *E. F.* &c. I have ſet my Hand and Seal, and to the third part of the ſaid Charter remaining with me, the ſaid *C.D.* and *E.F.* their Hands and Seals have put, *&c.* Nota.

Nota, ſuch Remainders are to lives *in eſſe.*

This Indenture made the firſt day of *May*, &c. between *A. B.* of the Pariſh of, *&c.* of the one part; and *C. D.* of the Pariſh of, *&c.* of the other part, *Witneſſeth*, &c. Indenture bipartite in the third Perſon.

This

Tripartite. **This Indenture** tripartite, made the second day of *May*, &c. between *A. B.* of, *&c.* of the first part; *C. D.* of, *&c.* of the second part; and *E. F.* and *G. H.* of, *&c.* of the third part; *Witnesseth*, &c.

Quadripartite. **This Indenture** quadripartite, made, *&c.* between *A. B.* of, *&c.* and *C. D.* his Wife of the first part; *D. E.* of, *&c.* of the second part; *F. G.* of, &c. of the third part; and *H. I.* of, *&c.* of the fourth part; *Witnesseth*, &c.

And so of the rest.

And note, That each part of such Indentures is of as much force and effect alone, and as beneficial to either of the said Parties, as both parts thereof together, *West's Symb. Lib.* 1. *sect.* 46,47.

Poll Deeds. Deeds Poll are Deeds only of one part, and cut even or plain at the top, beginning thus, *viz. Know all Men by these Presents.*

Or thus:

To all Christian People, &c. and may

may be made in the firſt Perſon or third.

Know all Men by theſe Preſents, That I A. B. *of*, &c. *Gent.* First Perſon.

To all Chriſtian People to whom theſe Preſents ſhall come, A.B. *of*, &c. *ſendeth greeting*; Whereas, *&c.* Third Perſon.

Be it known to all People, &c.

This preſent Writing witneſſeth, &c. *cum multis aliis*, any of which Forms may be in the firſt or third Perſon.

And each of theſe Deeds may conſiſt of Grants or Diſcharges.

Grants which are conſtitutive and creating what was not before, as the firſt Grant of a Way, of a Rent, or of an Eſtate in Tail, for Life, or for Years, with Warranty or without; and are either abſolute or conditional; or conveying, whereby Eſtates already or formerly made, are conveyed to others. Grants conſtitutive.

Of Diſcharges which are remiſſory or liberatory, releaſing or diſcharging ſomething in being; as Releaſes, Defeazances, Acquittances, &c. Diſcharges.

And

And moſt of ſuch Deeds and Inſtruments by which Lands paſs, as afore deſcribed, have formal and orderly Parts, *viz.*

The parts of Deeds.

The { *Premiſſes* 1. / *Habendum* 2. / *Reddendum* 3. / *Warranty* 4. / *Covenants* 5. / *Conditions* 6. / *Concluſion* 7. }

The Premiſſes what.

Firſt, the *Premiſſes* unto the *Habendum*, wherein is included

1. Grantor.
2. Grantee.
3. Thing granted.

By apt and proper Names and Deſcriptions, which are certain in themſelves, or which by Reference may be reduced to a certainty.

Words of Exceptions.

4. *Exceptions*, by theſe, or the like words, *Excepted*, *Excepting*, *Beſides*, *Saving*, *Save only*, &c. which muſt be firſt of ſome particular, out of a general; ſecondly part of what is granted, and not all; thirdly that which may be ſevered from

from the thing granted, and not an inſeparable incident thereunto.

5. *A Recital of ſomething antecedent.*

Nota, In many Deeds in the Premiſſes, there may be no occaſion of Exception or Recital; ſome may require either, and ſome both; as in the making of a new Leaſe, reciting the ſurrender of a former Leaſe, and excepting the Bodies of Oak Trees, or a Room out of a Houſe, or of Woods, *&c.* as the Caſe requires.

Nota, Exceptions of part, ought always to be of ſuch things which the Grantor had in Poſſeſſion at the time of the Grant, *Noy, page* 69.

Weſts Symb. Lib. 1. *ſect.* 48. The Premiſſes, ſaith he, is commonly all that precedeth the *Habendum*, or Limitation of the Eſtate, wherein are to be conſidered, firſt the Perſon contracting; next the Thing, Matter or Fact, whereof the Contract

To which may be properly added the date and conſideration; as Monies, Goods Natural Affection, *& ſimilia.*

tract is to be made; and then the Words, with which the ſaid Contract is to be deſcribed; for the Perſons are the very efficient, as the Conſiderations are the motive Cauſes; for which, and by whoſe conſent the Inſtruments are agreed upon and made.

Noys Max. page 133. In the Premiſſes are firſt the direct nomination, as well of the Feoffor as of the Feoffee, together with their Places of Reſidence, Habitation or Dwelling, and their Qualities, Eſtates, Additions or Conditions. Secondly, the certain expreſſment and ſetting down of the Lands conveyed.

Secondly the *Habendum* or conſequence of Deeds; whoſe Office is to ſet down,

1. Grantee.
2. Certainty of the Thing, Eſtate and Life granted, and to what uſe.

Weſts Symb. Lib. 1. *Sect.* 52. The later part of Inſtruments and Conſequence thereof, is all that neceſſa-

ceſſarily followeth the *Premiſſes*, and that is the *Habendum*.

The *Habendum* what.

In which is limited and expreſſed what Eſtate and Property the Party paſſive ſhall have; as Fee, Tail, *&c.* and that is twofold, namely the Limitation of the Eſtate, and of the Uſe reciting withal the Thing granted, by ſome ſufficient general Name, as *Habendum & Tenendum* the ſaid (Mannor,) Meſſuage or Tenement aforeſaid, with the Appurtenances (as the caſe requireth, and as it is granted in the Premiſſes) unto the ſaid *J. S.* his Heirs and Aſſigns for ever, to the uſe and behoof of the ſaid *J. S.* his Heirs and Aſſigns for ever.

Noy, 150. The Office of the *Habendum*, is to name again the Feoffee, and to limit the certainty of the Eſtate: and it may and doth ſometime qualifie the general Implication of the Eſtate, which by conſtruction and intendment of Law paſſeth in the Premiſſes; and the Premiſſes may be inlarged by the *Habendum*, but not abridged; it is alſo required of the *Habendum*

Habendum void.

dum to include the Premiſſes, *Noy*, *page* 54. The *Habendum* muſt not be repugnant to the Premiſſes; if it be, it is void, and the Deed will take effect by the Premiſſes, *Ibid.* That is, the precedent Eſtate given by the Premiſſes ſhall ſtand, and the Eſtate by the *Habendum* ſhall be void; As where a Feoffment is made to one and his Heirs by the Premiſſes of the Deed, *Habendum* to him and his Heirs during the Life of *I. S.* or if a Feoffment be made to one and his Heirs by the Premiſſes of the Deed, *Habendum* to the Leſſee for the Term of his Life: Now theſe words of Limitation, during the Life of *I. S.* or during the Leſſees Life, as aforeſaid, are void words, becauſe the *Habendum* is repugnant to the Premiſſes, *Landlord and Tenant*, *page* 139.

2 Co. *Buckleys* Caſe.

The *Habendum* ſometimes doth qualifie and control the general Implication, *&c.* as for example; A Leaſe to two, *Habendum* to one for Life, the Remainder to the other for Life; this Limitation doth alter the general Implication of

of the Joynt-tenancy, which would have been without the *Habendum*, and the *Habendum* is not contrary to the Premiſſes; for in the Premiſſes no certain Eſtate is paſſed, See *Buckleys* Caſe in the ſecond Book of Sir *Edward Cooks* Reports.

But *Landlord* and *Tenant* citing this very Caſe to ſhew that the *Habendum* doth control and qualifie the general Implication, ſaith, [And therefore the *Habendum* is void, in that the Premiſſes do make them Joynt-tenants; and the *Habendum* would ſever the Joynture, and make the one to have all during his Life, and the other the whole after him, and directs to *Plow. fol.* 133. and *Herns Law of Convey. p.* 2.] *Landlord* and *Tenant fol.* 140.

But Quere of this. *Quere.*

And what hath been aforeſaid, may be ſufficient to ſhew the Office of the *Habendum.*

To which alſo let us joyn the *Tenendum*, which before the Statute of *Quia emptores terrarum*, 18 *Ed.* 1. was uſually in Feoffments expreſſed from the Feoffors and their Heirs, and not of the Chief Lords of the *Tenendum.* what.

Fee, *&c.* whereby there happened divers Inconveniencies to the Lords, as the loſing of their Eſcheats and Forfeitures, *&c.* Whereupon it was granted, provided and enacted, That every Free-Man for the future, might ſell his Lands or Tenements, or part thereof at his Will, ſo that the Feoffee ſhould hold ſuch Lands or Tenements of the Chief Lord of the Fee, by the ſame Services and Cuſtoms, by which his Feoffor before held the ſame; which Statute was made for the advantage of Lords; And at this day where the Fee-ſimple paſſeth, the *Tenendum*, muſt be of the Chief Lords of the Fee, *&c.* for no Man ſince the ſaid Statute could ever convey Lands in Fee, to hold of himſelf, (except the King.) And note, That where Lands, *&c.* are conveyed in Fee, though there be no *Tenendum* at all mentioned, yet the Feoffee ſhall hold the ſame in ſuch manner as the Feoffor held before, *Quia fortur eſt Legis Operatio*, the Statute ſo determines, *Nov* 151, 152.

Third-

Thirdly, The *Reddendum* which reserves some new Thing to the Grantor, *&c.* and is usually made by the Words,

Yielding.
Paying.
Doing.
Reserving.
Finding, &c.

And reserves what was not before, or abridges the Tenure of what was before; and it is term'd an adjunct proper to the Consequence of Instruments, and is the Reservation of a Rent, Suit or Service, if any be reserved, *West's Symb. Lib.* 1. *sect.* 55. *Tenendum* what

If a Rent be reserved, it must be out of a Messuage, and where a Distress may be taken, and not out of a Rent, *Noy* 69.

And the Heir shall not have that which is reserved, if it be not reserved to him by special words, *Noy* 70.

Void Reservation.

If a Man makes a Feoffment of Lands, and reserves any part of the Profits thereof, as the Grass, or the Wood, that Reservation is void, because it is repugnant to the Feoffment, *Ibid.*

A Man by a Feoffment, Release, Confirmation or Fine, may grant all his Right in the Land, saving unto him his Rent-charge, *Ibid.*

Nota.

Things that are given only by taking and using, as Pasture for four Bullocks, or two Loads of Wood, cannot be reserved but by way of Indenture, and then they shall take effect by way of Grant of the Grantor, during his Life, and no longer without special words, *Ibid.*

Warranty what.

Fourthly, *Warranty*, *Warrantizo* it is a Verb used in the Law, and as *Littleton* saith, maketh the Warranty, and is the cause of Warranty, and no other Word in the Law: But it may be understood only of an express Warranty in Deed, and of a Warranty annexed to Lands; for there are other

Words

Words which will extend and inure ſufficiently to warrant Chattels, *&c.* and which will imply a Warranty in Law, as *Dedi*, &c. *Excambium*, &c. *Glanvil Lib.* 3. *c.* 1. *vel in Excambium*, or *Eſcambium datione*, Lit. *in his Chapter of Parceners, teacheth that Partition implyeth a Warranty in Law.* The Feoffor by the Words of *Dedi & conceſſi* ſhall be bound to Warranty during his own Life, *Noy* 84. There are three manners of Warranties, *Viz.* Warranty Lineal, Warranty Collateral, and Warranty which commences by Diſſeiſin, *Vide Littleton Chap. Warranty.*

Words implying Warranty.

The firſt is when one by Deed bindeth both himſelf and his Heirs to Warranty, after his Death this Warranty deſcendeth to, and upon his Heir.

Lineal Warranty.

The ſecond is in a Tranſverſe or overthwart Line, ſo that the Party upon whom the Warranty deſcendeth, cannot convey the Title which he hath in the Land, from him that was the maker of the Warranty.

Collateral Warranty.

Warranty by Diſſeiſin.

The third and laſt is where a Man unlawfully entreth upon the Free-hold of another, thereof diſſeiſing him, and conveyeth it with a Warranty, *Noy*, 83.

Lineal Warranty barreth him that claimeth Fee, and alſo Fee-tail, with Aſſets in Fee; *Ibid.*

How it barreth

Collateral Warranty is a Bar to both, except in ſome Caſes that be remedied by Statute, as Warranty by the Tenant by the Courteſie, except he hath enough by deſcent by the ſame Tenanty *Ibid.*

Warranty by Diſſeiſin barreth not at all.

How Warranty deſcendeth

Warranty deſcendeth always to the Heir at the Common Law, with the eldeſt Son, and followeth the Eſtate, and if the Eſtate may be defeated, the Warranty may alſo, *Noy* 84.

It barreth not the ſecond Son in Gavelkind; although all the Sons ſhall be vouched, and not the eldeſt alone, yet he alone ſhall be barred, *Ibid.*

Every Warranty which deſcends, doth deſcend to him that is Heir,

to

to him which made the Warranty by the Common Law, *Noy* 154.

Cowels Interp. Title Warranty, ſaith, That under the word *Hæredes* are compriſed all ſuch, as the firſt Warranters Lands come unto afterwards, either by deſcent, or otherwiſe *ex cauſa lucrativa*, ſo that if a Man have twenty Children, yet if he give his Land to a Stranger, leaving his Children no Land, that Stranger in this caſe is his Aſſignee, and is contain'd under this word Heir, ſo that if he commit Felony after ſuch Warranty covenanted and forfeit his Lands to his Lord by Eſcheat, the Lord is *quaſi hæres* in this caſe, and liable to the Warranty formerly paſſed. To this may be joyned the word *Defend.* being uſed in Feoffments, *&c.* whereby as *Bracton* ſaith, The Feoffor bindeth himſelf and his Heirs to defend, &c. *Si quis velit ſervitutem ponere Rei datæ contra formam donationis*, &c. Nota. *Defendemus.*

Covenants what.

Fifthly, The Covenants containing the Terms of Granting and Holding, being either real or perſonal, and inherent or collateral, muſt contain Things lawful and poſſible to be done.

A Covenant is the conſent of two or more in one ſelf thing, to give or do ſomewhat, *Weſt, part* 1. *Lib.* 1. *ſect.* 4.

Covenant in Law.

And there is a Covenant in Law, and a Covenant in Deed, or Covenant expreſs, and Covenant in Law; a Covenant in Law is covert or hid, and to be implied; as if the Leſſor do demiſe, *&c.* to the Leſſee for a certain Term, the Law intendeth on the Leſſees part, that the Leſſee ſhall during his whole Term quietly enjoy his Leaſe againſt all lawful Incumbrances, *Cowels Interp. Title Covenant.*

Covenant in Deed.

Covenant in Deed, or Covenant expreſs is manifeſt, and that which is expreſly agreed between the Parties; and this is the Covenant we now intended, which as aforeſaid, may be either real or perſonal, *Fitz. N. B. f.* 145. A

A Covenant Real is whereby a Man tieth himself to pass a Thing real; as Lands or Tenements; as a Covenant to levy a Fine, *&c.* A Covenant meerly personal, is where a Man covenanteth by Deed with another to build him a House, or any other thing, or to serve him, or to enfeoff him, *&c.* *Cowels Interp. Tit. eod.* Covenant Real. Covenant Personal.

Covenant collateral is that which cometh in, or is adhering of the side; as Collateral Assurance is that which is made over, and beside the Deed it self. Covenant Collateral.

Note also, A Bond for performance, is termed a Collateral Assurance, because it is external, and without the essence of the Covenant, *Cowels Int. Tit. Covenant.* Nota.

The words of Covenants are, Covenant, Grant, Promise and Agree, expressing the thing agreed upon by apt words; and there be Deeds made altogether of Covenants, whereof you may see good store in *West Lib.* 2. *sect.* 57, 58, 59, 60, &c. Words of Covenant.

Nota, All Covenants are to be made on either ſide, according to every ſeveral Contract, as to be ſaved harmleſs or diſcharged, to be ſeized in Fee, *&c.* To have power to ſell, to be Owner of the Tenements or Chattels ſold, to make further aſſurance, for quiet enjoyment, *&c.*

Sixthly, The Conditions which are precedent, or ſubſequent to the Eſtate.

Conditions what.

A Condition is generally a Rule, Manner or Law annexed unto Mens Acts, ſtaying and ſuſpending the ſame, and making it uncertain, whether they ſhall be or no: For a Condition is properly ſaid to be, when any thing is referred to any incertain Chance, which may happen or not happen.

Weſt, Symb Lib. 2. ſect. 110.

The Words of a Condition.

The words of a Condition are, *Sub Conditione, Ita quod, Si Contingat, Proviſo ſemper,* i. e. *Under Condition, So that, If it ſhall happen, Provided always, and the like*; But the words, *To the effect, with that intent, to pay,* &c.

&c. do not make a Condition in Feoffments and Grants, if it be not in the Caſe of the King, or in the Caſe of a Will, *Landlord and Tenant, page* 34.

Note, There are two manners of Conditions, one expreſſed by Words, and called a Condition in Deed; the other implied by Law, and called a Condition in Law. *Nota.*

A Condition in Deed, or expreſs Condition, is knit, and annexed by expreſs words to the Leaſe or Grant; for example, If I make a Leaſe for Years, reſerving Rent to be paid at ſuch a Feaſt, upon Condition, That if the Leſſee fail of payment at the day, that then it ſhall be lawful for me to re-enter. Condition in Deed.

A Condition implied, or Condition in Law, is when a Man grants to one the Office to be Keeper of a Park, Steward, Bailiff, or ſuch like, for Term of Life; here the Law implieth a Condition, That if he doth not truly and Condition in Law.

and faithfully execute his Office, then it ſhall be lawful for the Grantor to diſcharge him thereof.

Nota. Note alſo, All Conditions are as aforeſaid, either precedent and going before the Eſtate, and are executed; or elſe they are ſubſequent and following after the Eſtate, and to be executed.

Condition precedent. Condition precedent doth gain and get the Thing or Eſtate made upon ſuch Condition, by the performance of the ſame; as when an Eſtate is made to a Man for Life, upon Condition, That if the Leſſee for Life will pay to the Leſſor 20 *l.* at ſuch a day, then he ſhall have Fee-ſimple; here the Condition precedes, and goes before the Eſtate in Fee-ſimple, and upon the performance of the Condition, the Leſſee doth gain and get the Fee-ſimple, if Livery and Seiſin were given.

Error was brought in *Ejectment* out of *C. B.* in a ſpecial Verdict, The Caſe was, John Hamond *having*

two

two Sons, John *and* Thomas, *being ſeized of a Copyhold Eſtate in Fee, in nature of* Burrough Engliſh, *ſurrenders to the uſe of himſelf for Life, and after his Deceaſe to the uſe of his Son* John, *and his Heirs and Aſſigns for ever, if he attain the Age of twenty one Years*; Provided, *That if my ſaid Son* John *do die within Age, then it ſhall go to my right Heirs.*

Holt pro Quer' in Error', ſaid, *The Queſtion was, If it was a Condition precedent or ſubſequent, and held it was a Condition precedent, and cited* Plowden 35. and ſaid, *A ſubſequent Condition is to be taken ſtrictly, and muſt have proper words; but a precedent Condition may not,* Lit. 330. 1 Inſt. 103. Lit. ſect. 301. Jones, Spring *and* Ceſar, fol. 389.

Pollexfen pro Def. ſaid, *There may be a Remainder upon a Condition precedent, and Judgment was affirmed,* Mich. 26 Car. 2. Bockeril *verſus* Hamond, Ro. 120.

A Condition ſubſequent, doth keep and continue the Thing or Eſtate made upon Condition, by the

Condition ſubſequent.

the performance thereof; as when one grants to *A. B.* his Mannor of *G.* in Fee-ſimple, upon Condition that the Grantee ſhall pay to him at ſuch a day 20 *l.* or elſe that his Eſtate ſhall ceaſe: here the Condition is ſubſequent, and following the Eſtate in Fee-ſimple, and upon the performance thereof, doth keep and continue the Eſtate.

Terms del Ley verb. Condition.

Void Condi-tions.

Nota, *If an Eſtate be made, and the Condition againſt the Law, the Eſtate's good, the Condition void,* Noy, p. 78.

If the Eſtate beginneth by the Condition, then both are void, *Ibid.*

Conditions repugnant, the Eſtate good, the Condition's void, *Ibid.*

Conditions impoſſible are void, and the Eſtate good, *Ibid.*

It ſhall not enlarge any Eſtate, *Ibid.*

No Man ſhall take advantage of a Condition, except he be privy or party to it.

When

When the word *Proviso* maketh a Condition, it must have these three Qualities; First it must not depend upon another Sentence, or have Reference to any other part of the Deed, (for if it do, then it is but a Qualification or Limitation of the Sentence, or of that part of the Deed, as Provided that the Person of the Grantee shall not be charged.) Secondly it must be the word of the *Bargainor*, *Feoffor*, *Donor*, *Lessor*, &c. Thirdly, it must be compulsory to inforce the *Bargainee*, *Feoffee*, *Donee*, *Lessee*, &c. to do an Act; and where these Things concur in a Proviso, it doth make a Condition, in what place soever it be placed; For *cujus est dare*, *ejus est disponere*, Landlord *and* Tenant, p. 61.

Of the Word Proviso.

When and how it maketh a Condition.

But note, the Case put afterwards. ☞

Nota, Sometimes the word *Proviso* or *Provided* doth make a *Covenant*; sometimes an *Exception*; sometimes it is taken for a *Reservation*; sometimes for an *Explanation*, Ibid.

When a Lessor letteth Lands, Provided

Proviſo maketh a Condition. Provided that the Leſſee ſhall not alien without the aſſent of the Leſſor under pain of forfeiture, here it is a Condition. *Ibid.*

An Explanation. If a man have two Mannors both of them named *Dale*, and he leaſeth his Mannor of *Dale* to one, Provided that he ſhall have the Mannor of *Dale* in the occupation of *A. B.* This Proviſo is an Explanation. *Ibid.*

A Covenant. If a man leaſe a Houſe, and the Leſſee covenants that he will repair it, provided always the Leſſor is contented to find the great Timber; This Proviſo is a Covenant, *Ibid.*

An Exception If a man leaſe his Houſe to *D.* provided he will have a Chamber thereto belonging to himſelf, This Proviſo is an Exception of the Chamber, *Ibid.*

A Reſervation If I make a Leaſe of Lands rendring Rent at ſuch Feaſts as *J. S.* ſhall name, provided that the Feaſt of St. *John Baptiſt* ſhall be one; here the Proviſo is taken for a Reſervation, *Vid. Land-Lord and Tenant*, p. 61, 62.

☞ The Caſe was, A. *lets to* B. *for twenty one Years, and after the* Reddendum *is a Covenant*, Provided al-

always, &c. *That the Leſſee ſhall not let or aſſign over his Term without the conſent of the Leſſor firſt had in Writing.*

B. *cannot aſſign over to* D. *leſt* A. *enter upon him, and ouſt him, becauſe 'tis a Condition: And although the words are, That he ſhall not let,* &c. *Yet if there be any other Covenants between the* Reddendum *and this* Proviſo, *then 'tis but a Covenant: And if* B. *do let to* D. A. *cannot turn him out, but have an Action of Covenant againſt* B. *but if otherwiſe* A. *may turn him out.*

Therefore obſerve whether it doth follow the Reddendum *or no.* Nota.

Edmund Saunders.

And note, Theſe Conditions precedent or ſubſequent to the Eſtate, are or may be, *Affirmative, Negative, Collateral, Inherent, Reſtrictive, Compulſory, Single, Copulative* and *Disjunctive*, and make the Eſtate whereto they are annexed void without, or voidable by Entry, or Claim, or tend to make and enlarge, or deſtroy or clog Eſtates.

Seventhly,

Conclusion what.

Seventhly, The Conclusion, *In cujus rei Testimonium*, In Witness whereof, *&c.*

This Clause is added as a Preparatory Direction to the sealing of the Deed; for sealing is essentially required to the perfection thereof, because it doth plainly shew the Feoffors or Parties consent to, and approbation of what is therein contained, *Noy*, *p.* 155, 156.

Nota.

And note, That the date of the Deed, which is the Description of the Time in which the Deed was made, either by the Year of the Lord, or the Year of the Princes Reign, may be placed in the Conclusion, and is so most usually in all Deeds Poll: but otherwise in Deeds indented most commonly and properly in the beginning of the Premisses, as before is touched in several Examples.

Words to be used in Instruments.

And here take notice that such words are to be used in the making of

of Inſtruments, as the nature of the Contract doth require; as in Feoffments, *Feoffavi, Dedi* or *Conceſſi*, have enfeoffed, given, granted, &c. In Feoffments

In Bargain and Sale, have bargained and ſold, &c. In Bargain and Sale.

In a Gift or Grant, have given, granted and confirmed. In Gift or Grant.

In a Leaſe for Years, have demiſed, granted and to farm let. In a Leaſe.

In a Releaſe, have remiſed, releaſed and for ever quit claimed. In a Releaſe.

In Aſſignments, have given, granted, aſſigned and ſet over. In Aſſignments.

In Exchange, have given, granted and confirmed, and by theſe Preſents, &c. *unto* A. B. *and to his Heirs and Aſſigns for ever in Exchange*, &c. In Exchange.

In a Surrender, hath ſurrendred, granted and confirmed. In Surrender.

In a Confirmation, have ratified, approved and confirmed, &c. In Confirmation.

CHAP.

CHAP. IV.

Shewing what Things are required to the making of a good Deed or Instrument.

AND thus I have laid you down the formal and orderly Parts which ought to be observed in the making of Deeds and Instruments; but it is requisite to let you further know,

Requisites.

That to the making of a good Deed are required,

Legible Writing.

First, Legible and formal Writing in Paper or Parchment, before sealing and delivery.

Capable Persons.

Secondly, Capable Persons not disabled by Law, (but Donors and Donees that are Monks, Friers, *&c.* are disabled.)

Also Persons attainted of Treason, Felony or *Præmunire*.

And

And { Infants, Madmen, Idiots, Femes-Covert, Aliens, Deaf, Blind & Dumb from Nativity. } *Are diſabled, except in ſeveral ſpecial Caſes and Things* Defects hindring.

For all which, by Nature can conſent, cannot alſo conſent by Law: But Age hindreth ſome; and ſome the Defects of the Body; and ſome the Defects of the Mind, ſo that they cannot conſent, *Weſt, Symb. part* 1. *Lib.* 1. *ſect.* 4.

Age hindreth thoſe that be within the Age of twenty one Years. Defects of the Mind, thoſe that be of full Age, *Ibid.* Age.

Infants which underſtand not what is done, can therefore neither make Obligation nor Covenant, which may take beginning at their Perſons; except ſuch as be at the Age of Diſcretion; That is, Males at the Age of fourteen Years, and Females of twelve Years, which in Infancy. Exception.

in ſome Caſes may covenant and be bound; as for neceſſary Food, Rayment, Schooling, Inſtruction, &c. or as Executor to another, &c. *Ibid.*

Lands properly named.

3. It muſt be a Thing to be granted and paſſed.

4. It muſt be by proper and ſufficient Names and Deſcriptions, both of the Grantor, Grantee, and Thing granted.

Grantable.

Which muſt be grantable in its own Nature, and by him that grants it, and is either corporeal and immoveable, or incorporeal, or Chattels: Corporeal and immoveable; as Houſes, Lands, Woods, &c. which are grantable in Fee, Tail, for Life, for Years, &c. and aſſignable from Man to Man.

Incorporeal; as
- Rents.
- Services.
- Advowſons.
- Preſentations.
- Reverſions.
- Remainders.
- Offices.
- Licences.
- Franchiſes.
- Commons, &c.

Where

Whereof ſome are grantable at their firſt Creation, but not aſſignable after.

As { Great Offices of Truſt. / Judicial Offices. / Licences. / Authorities, &c.

Some are
1. Aſſignable always.
2. Intirely, but not in part.
3. Intirely or in part.
4. To any Body.
5. But to ſpecial Perſons.
6. Some Things incident to others, and not grantable without the Things to which they are incident.

Or Chattels which are either real; as Leaſes for Years preſent, or to come, Extent, &c. — Chattels real.

Or perſonal; as Horſes, Oxen, Plate, &c. — Perſonal.

Fifthly, The true reading or declaring to a blind or illiterate Perſon. — Reading the Deed.

Sixthly,

Sealing and delivery.

Sixthly, Sealing and Delivery.

By the Maker or his Attorny abſolutely and poſitively to, or to the uſe of the Party.

Or conditionally, and as an Eſcrow to another.

To honeſt Ends.

Seventhly, To an Honeſt end, and not by unlawful Contract, or made by Force or Fraud.

Eighthly, Due Ceremony; as Attornment,

Livery of Seiſin,

Inrolment, &c.

Deeds executed not alterable.

A Deed when made, read, ſealed and delivered, may be altered or amended in nothing, *Weſt*, *Symb. part* 1. *Lib.* 1. *ſect.* 56.

Eſcrow.

A Writing cannot be ſaid to be a Deed if it be not ſealed; although it be written and delivered, it is but an Eſcrow, *Noys Max. p.* 55.

Inſufficient Deed.

And if it were ſufficiently ſealed, yet if the print of the Seal be utterly defaced, the Deed is inſufficient, it is not my Deed; and though it may not be ſo pleaded, yet it may be given in Evidence, *Ibid.*

A Deed taketh effect by the delivery, and if the first take any effect, the second is void, *Ibid.* How it taketh effect.

And a Jury shall be charged to enquire of the delivery, but not of the date; yet every Deed shall be intended to be made when it doth bear date. Delivery and Date.

So if a Lease be made, dated the third of *May* 1688. to have and to hold for three Years from henceforth, or from the making; and it is delivered the 20 day of *June* after, in this case the day of the delivery shall be the first day of the Term, and must be taken inclusive, and the Lease shall end the 19 day of *June* in the third Year, *Co. Lit. fol.*46. *Co. Rep.*5. *fol.* 1. & 93. *Noys Max. p.* 55. *Herns Law of Conveyances p.* 14, 15. How Deeds shall commence.

The delivery ought to be done by the Party himself, or by his sufficient Attorny, and so it shall bind him whosoever wrote or sealed the same, *Noys Max. p.* 55. Delivery how to be made.

If one be bound to make Assurance, he need not deliver it, unless there be one to read it to him before, *Ibid. p.* 56. Reading the Deed.

False reading. And if any Writing be read in any other form to a Man unlearned, it shall not be his Deed, *Ibid.*

Deeds how voidable. And yet a Deed when well made, read, sealed and delivered, may be void or voidable, when got

By { Force, Fraud, Corrupt Agreement.

Or may be marred by { Rasure, Interlining, Addition, Breaking the Seal, Defacing, Judgment of Court, &c.

Voidable Deeds. All Feoffments, Gifts, Grants and Leases made by dures of Imprisonment, are voidable; and that not only by the Parties themselves but by their Heirs, and those who have their Estates, *Perkins, sect.* 16 *Plow.* 18. *a. Co. Lit. fol.* 253.

CHA

CHAP. V.

Shewing the Form and Effect of Livery of Seiſin and Attornment, &c. *And what is a Reverſion, Remainder and particular Eſtate.*

Livery and Seiſin.

LIvery and Seiſin, is a Ceremony uſed in the Conveyance of Lands, that the Common People might know the paſſing or alteration of the Eſtate; that they might ſurely know in whom the Right thereof remained for their own peace and quietneſs, *Perk.* 209, 210. *Bract. Lib.* 2. *cap.* 18. *ſect.* 12. *Noys Max. p.* 58. *Weſt, Symb. p.* 1. *Lib.* 2. *Sect.* 251. Defined.

The uſual manner of Delivery of Seiſin, of Houſes, Lands, Tenements, *&c.* is thus:

The Feoffor and Feoffee, (if they be preſent) or in their abſence How to be executed.

their Attornies (ſufficiently authoriſed in Writing,) do come to the Houſe or Place whereof ſuch Seiſin is to be delivered, and there in the preſence of ſundry good Witneſſes, declare the cauſe of their meeting there; and then openly read, or cauſe to be read the *Deed of Feoffment (and Letter of Attorny*, if by Attorny) or to declare the very effect thereof, before them in *Engliſh*; which being ſo done, the Feoffor or his Attorny taketh a Clot of Earth, or a Bough, or a Twig of a Tree thereupon growing; the Ring, or the Haſp of the Door of an Houſe, and delivers the ſame with the ſaid Deed unto the Feoffee or his Attorny, ſaying, *I deliver theſe unto you in the name of Poſſeſſion and Seiſin, of all the Lands, Tenements, &c. contained in this Deed, To have and to hold, according to the form and effect of the ſame Deed*, Ibid.

The Effect. By Livery of Seiſin the Feoffor transferreth unto the Feoffee all that he hath in things whereof Livery is made, according to the State thereupon limited, *Weſt, ſect.* 251. *p.* 1. *Lib.* 2. And

And the date and manner of this Seisin must be endorsed (thus,)

Memorandum, *That the day of peaceable and quiet Possession and Seisin of the Lands and Hereditaments within mentioned to be granted, was had and taken by the within-named* A. B. *and by him was delivered to the within named* C. D. *in their proper Persons, according to the Tenor, Form and Effect of the within written Deed, in the presence of us,*

A. B.
C. D.
E. F.

Indorsement of Seisin.

Note, If by an Attorny to an Attorny, or by Attorny to the Lessee himself, or by the Lessor to an Attorny, then you say, *By (or to)* A. B. *Attorny of the within named* C. D. *and so of the like,* mutatis mutandis, *West*, Ibid.

By an Attorny.

Note, A Man cannot make Livery of Seisin before he hath the Possession, *Noys Max.* 57.

Possession necessary.

Livery of Seisin is requisite in all Feoffments, Gifts in Tail, and Leases for Life, made by Deed or without Deed, *Ibid.* 59.

Where it is requisite.

Freehold. No Freehold will pass without Livery of Seisin, except by way of Surrender, Partition or Exchange, or by matter of Record, or by Testament, *Ibid.*

Time. Livery of Seisin must be made in the Life-time of him that made the Estate, *Ibid.*

Lease for Years. There needs no Livery of Seisin to be given on a Lease for Years, but the Lessee may enter when he will, *Co. Lit.* 48. *a.* And if Livery be given, he shall have but an Estate for Years.

Assignment of Dower. There needeth neither Livery of Seisin, nor Writing to an Assignment of Dower, because it is due of Common Right, *Idem fol.* 35. *Dyer* 91.

They in Possession cannot take it. Note, If there be a Lease for Years, and a Remainder granted over in Tail, or in Fee, or for Life, then there must be Livery given to the Lessee for Years, or otherwise nothing passes to him in the Remainder; And if the Lessee enter into the Land before Livery, and enjoy, then the Lessor after his Entry cannot make Livery

to

to him, for he is then in Posses-sion, and such Persons as have Pos-session in Lands for Years, or for Life, *&c.* cannot take by Livery and Seisin of the same Lands, for Livery must be given of, and ought to bring an immediate Possession, *Lit. Tenures fol.* 13. *a. Co. Lit. fol.* 49. *b. Herns Law of Convey. p.* 25. *Co. Rep.* 2, *fol.* 31.

For it ought to bring an immediate Possession.

The Lessor cannot make Livery and Seisin against the Will of the Lessee being on the Land, but he may grant the Reversion; and if the Lessee do attorn, the Freehold will pass without Livery of Seisin, *Noys Max. p.* 58.

Cannot be against the Lessees Will.

If two several Deeds be made to two several Persons, of one self thing, it passeth unto him unto whom Seisin is first delivered, *West. Symb. sect.* 251. *part* 1. *Lib.* 2.

How it passeth where two Deeds of one thing.

By Livery of Seisin in one County, the Lands in another County will not pass, *Noys Max. p.* 59.

County.

And therefore if they lie in several Counties, it is convenient that he enter into every parcel thereof, and so make Livery in every several parcel, for he can

Several Counties.

give no Possession unto his Feoffee, if he have it not in himself at that very instant, *West, ubi supra.*

Estate *in futuro*

Livery may not be made of an Estate to be given *in futuro*, for no Estate of Freehold or Franktenement may be given *in futuro*, but shall take effect presently by Livery and Seisin, *Noys Max. p.* 59.

See the Case of a Lease for Years with Remainder, *ut supra.*

Livery of Seisin is twofold.

And note that Livery of Seisin is of two sorts, *viz.* in Law, and in Deed, *Noys Max. p.* 160.

Livery of Seisin in Law, is termed Livery of Seisin within the View, which is, when a Man maketh a Deed of Feoffment, and delivers Seisin within the View, the Feoffee being afraid to enter, *Ibid.* 163.

Livery within the View.

And note, This Livery within View is good, if the Feoffee do enter in the Life-time of the Feoffor, *Idem p.* 59.

Perfected by Entry in Law.

And yet it is said, that a Livery in View or Law, may sometimes be perfected by an Entry in Law, which is, when the Feoffee being afraid to enter, as before,

maketh

maketh continual Claim of the ſame, 38 *Aſſ. pl.* 23.

And it is ſaid that no Man can conſtitute another to receive Livety for him within the View, nor yet to deliver; for none can take by force or virtue of a Livery in Law, but he that taketh the Freehold himſelf, *Et ſic e contra*, *Noys Max. p.* 163. No Attorny in Livery in View.

Livery and Seiſin in Deed is actually done either perſonally or by Attornies, as is before explained. Livery in Deed.

Attornment.

The end of Attornment is to perfect Grants, and therefore may not be made upon Condition, or for a Time, *Noys Max. p.* 64. but it ſhall enure to the whole abſolutely. Defined.

Attornment is the Agreement of the Tenant to the Grant, by Writing or by Word; as to ſay, *I do agree to the Grant made to you; or I am well contented with it; or I do Attorn unto you, or I do become your Tenant, &c. or delivering a Penny unto the Grantee, by the Tenant*

by way of Seisin of a Rent, and to pay or do but one Service only in the name of the whole, it is good for all, Ibid. p. 63, 64.

Where it effecteth.

Lands and Tenements, and such things as naturally lie in Grant, cannot be transferred from one to another by bare Grants of the Parties, without the Attornment and Agreement of others; as of the Tenant, to the Grant of the Seigniory, (or of a Rent,) or the Agreement of the Donee in Tail, or of the Tenant for Life or Years, to a Grant of a Reversion or Remainder made by the Donor or Lessor to another; as,

Where necessary.

Where he that hath an Estate in Reversion or Remainder, after an Estate for Life or Years, doth grant or give the same away; here the Tenant of the Land must give his consent to such Grant or Gift, or else generally the same is not good, and this yielding of consent is called Attornment: See *Terms de Ley, Co. Lit. fol.* 309. *pl.* 25.

At-

Attornment is either Actual or in Law. Twofold.

Actual is an expressed consent to the Grant, as before, *Lit.* 551. *Plow.* 25. a. 344. a. Actual.

Attornment in Law, is where the Person that ought to attorn, doth not expresly declare his consent, but doth some other Act, as in Law sufficiently implieth an Agreement; as if a Lease be made for Life or Years, and after he that hath the Reversion or Remainder, granteth the same to his Lessee, who accepteth the Deeds; These and such like be Attornments in Law, *West, Symb. Lib.* 2. *sect.* 383. In Law.

To the making good of an Attornment, where it is requisite divers Things are required. Requisits to make a good Attornment.

1. It must be made by the Person that ought to make it.

2. It must be made to the Person that ought to take it.

3. It must be made in due time.

4. If it be an expres Attornment, the Tenant must have notice of the Grant of the Reversion, &c. to which he must Attorn; but of

of Attornment in Law, there notice in all Cases is not necessary.

5. It must be done in such manner as the Law doth prescribe.

By Word or Deed. And observe (as before) that it may be made either by Words or Deeds without Writing, or by Deed or Writing, and this is the safest way.

By Word. And any Word written or spoken by the Tenant, (after he hath knowledge of the Grant of the Reversion) which do import an Assent or Agreement to it, will make a good Attornment in Fact or in Deed; as to say, *I do Attorn, or turn Tenant to you according to the Grant, or if he do pay all or any of the Rent, or do any part of the Service,* (as before) this is a good express Attornment; and is best of all when it is made by Words, and Deed or Sign both, for then the Witnesses will best remember it, *Co. Lit. fol.* 309, 310, 315. *Plow. Com.* 344. *Land-lords Law, p.* 127. 128.

Best by Word and Deed both.

When to be made. Where Attornment is necessary, it must be made in the Life-time of the Parties Grantor and Grantee, for

for if either of them die before Attornment be made, the Grant is void; but if the Tenant die before he Attorn, he that hath the Eſtate may Attorn, and it is good; or if the Tenant grant over his Eſtate, his Aſſignee may Attorn, *Co. Lit. fol.* 315. *a. Perkins ſect.* 231, 263. *Lit. Tenures* 110. *a. Co. Rep. f.* 8. *Noys Max. p.* 64.

It ſeems that Attornment is not neceſſary, but to have Avowry, or an Action of Waſt, 2 *E.* 6. *Brook* 45. Where neceſſary.

Note, That when no attendency nor payment is to be made by the Tenant, there the thing paſſes without Attornment, 31 *H.*8. *Brook* 59. Where not.

Where Attornment is neceſſary in Law or in Deed, See *Land-lords Law p.* 129, 130, 131, 132, 133, 134, 135, 136. Note.

This Attornment muſt be indorſed on the Deed, or elſe declared by a Deed, and may be done in this manner:

Memo-

Indorſement for one Tenant.

Memorandum, *That the within named* A. B. *being Tenant for Term of Life,* &c. (*or being preſent Tenant,* &c. *as the Caſe requires*) *of the Lands, Tenements and Hereditaments,* &c. *underſtanding the effect of the within written Grant, thereof made unto the within named* C. D. *did the day of* Anno *aſſent and agree unto the ſame Grant in every reſpect as the ſame is within written, and did therefore Attorn, and for proof thereof did give unto him the ſaid* C. D. *in the name of Attornment the Sum of* 6 d. *in the preſence of us whoſe Names are ſubſcribed,*

A. B.
C. D.
E. F. *&c.*

Or thus, by divers Tenants themſelves.

For divers Tenants.

We whoſe Names are hereunder ſubſcribed, being the preſent Tenants, (&c.) *of,* (&c.) *underſtanding,* (&c.) *do aſſent,* (&c.) *and do therefore Attorn, and in Teſtimony of ſuch Attornment, each and every of us*

we did give, (&c.) *and also have hereunto subscribed our Names the* day of Anno Domini, 1688.

Witness.
A. B.
C. D.
E. F.

Or thus:

Memorandum, *That the Persons whose Names are under written did the* day of Anno Domini, 1688. *Attorn and become Tenants unto the above named* A. B. *according to the purport of the Lease within mentioned, having notice of the said Grant, and for proof thereof every one of them did give unto the said* A. B. *one Peny in the Name of Attornment.*

Notice of the Grant.

Witness hereto
G. H.
I. K.
L. M.

Here let the Tenants set their Names,
A. B.
C. D.
E. F.

It

Indorſed with Livery of Seiſin.

It may be indorſed together with the Livery of Seiſin to an Attorny thus.

Memorandum, *That Poſſeſſion and Seiſin of the Lands and Tenements within mentioned was taken by,* (&c.) *and afterwards delivered to the within written* S. P. 10. die Junij, Anno Domini 1688. *to the uſe within written. And alſo the ſame day (the within named)* J. V. *Tenant of the Premiſſes for the Term of his Life, did attorn Tenant to the ſaid* S. P. *according to the Tenor of this preſent Deed; and the ſaid* J. V. *did give unto the ſaid* S. P. *one Peny in the name of Attornment, in the preſence of*

Querie if the Tenant that attorns be named in the Deed, otherwiſe that Clauſe to be left out.

It may be declared by Deed Poll thus:

Attornment declared by Deed Poll.

To all People, &c. *I* A. B. *of,* &c. *ſend greeting; Whereas I the ſaid* A. B. *have and hold for the Term of my Life one Tenement with the Appurtenances, lying and being in,* (&c.) *the Reverſion of which ſaid Tenement ſhould belong to one* C. D. *and being at*

at preſent ſatisfied, that the ſaid C. D. *hath by his Deed bearing date,* &c. *granted, bargained, ſold and confirmed unto* E. F. *of,* &c. *the Reverſion of the ſaid Tenement, as by the ſaid Deed may appear.*

Know ye that I the ſaid A. B. *Tenant of the ſaid Tenement, of my free will have attorned unto the ſaid* E. F. *by payment unto him of one Peny in the name thereof, and do by theſe Preſents as much as in me lies, ratifie and confirm unto the ſaid* E. F. *the Reverſion aforeſaid, In witneſs,* &c. *See* Weſt, Symb. part 1. Lib. 2. ſect. 383, 384, 385, *&c.*

Note, A voluntary Attornment where it is needful may be made by an Infant, or one that is Deaf and Dumb may do it by ſigns; but one that is not *Compos mentis* cannot make an Attornment, *Co. Lit. fol.* 315. *Co. Rep. fol.* 84. Voluntary Attornment by an Infant.

Note, It muſt be certain, *Co. Lit.* 310. Certainty.

In all Caſes for the moſt part where there is no means provided by Law, to compel the Tenant to attorn; in ſuch Caſes Attornment

Where it needs not.

ment in Deed or in Law is not neceſſary, as in the grant of a Seigniory, *&c.* by Letters Patents from the King; or where ſuch things are granted by matter of Record from a Subject to the King; but a Seigniory, a Rent-charge, a Remainder or a Reverſion will not paſs without Attornment, but by matter of Record, *Co. Lit.* 314, 321. *Co. 6. Rep.* 68. *Noys. Max. p.* 64.

Deviſe.

Attornment neceſſary upon a Deviſe, *Noys Max. p.* 65.

Needleſs.

In all Caſes where the Grant is in the perſonalty there needs no Attornment, as in Annuities which do charge the Perſon only and not the Land: And in all Caſes where there is an Attornment in Law, there needs none in Deed, *M. 3. Jac.* in *C. B.* agreed in *Curnock's* Caſe.

Void Attornment.

Noy ſaith in his Maxims, p. 65. *That if the Tenant have true notice of all the Grant, then ſuch Attornment is void*: But quere.

Common of Paſture for a certain number, or Common of Estovers certain, will paſs by Grant with

without Attornment; for where there is no Tenure, Attendance, Remainder, Rent or Service to be paid or done, Attornment is not necessary, 31 *H.* 8. 59. *Kitchin* 103. *a.* Needless.

Note, Attornment is a solemn Act, and ought to be done, so that notice may be taken of it, and therefore Attornment after Sun-set is not good, for it shall not be presumed that notice can be taken in the Night, *M.* 23 *Car.* 1. in *B. R. Registr. practicale*, p. 30. Time when it must be done.

Concerning Possessions.

The difference between Possession and Seisin is, Difference of Possession and Seisin.

A Lessee for Years is possessed, and yet the Lessor is still seized; and therefore the Terms of the Law are, That of Chattels, a Man is possessed, whereas in Feoffments, Gifts in Tail, and Leases for Life, he is called seized. *Noys Max. page* 20. Possession what. Seisin what.

And

Of Estates. And note that all Estates that have their being, are in Possession, Reversion, Remainder, or in Right; but of all these, Possession is the principal, *Idem, page* 119.

There are two Degrees of Possession; in Law, and Deed.

Possession in Deed. In Deed, is the actual Possession;

In Law. In Law, is that Possession which the Law it self casteth upon a Man before any entry or pernancy of the Profits;

Example. As where the Father dieth seized of Lands in Fee, and the same is to descend to the Son as his next Heir; in this Case before any Entry the Son hath a Possession in Law, *Ibid. p.* 120.

Reversion Expectant, &c. And so of a Reversion expectant, or a Remainder dependent upon a particular Estate for Life;

Example. As if Tenant for Life die, he in Reversion or Remainder before his Entry, hath only a Possession in Law.

And note, That all manner of Possessions that are not Possessions in Fait or Deed, are only Possessions in Law, *Noys Max. p.* 120.

Of

Of a Particular Eſtate.

A Particular Eſtate is ſuch as is derived from a General Eſtate, by ſeperation of one from the other, *Noys Max. p.* 117. Defined.

As an Eſtate Tail, for Life, or for Years, created by Gift or Grant out of a Fee-ſimple, is in the Donee or Leſſee a particular Eſtate in Poſſeſſion, derived and ſeparated from the Fee-ſimple, *Ibid. & ſimilia.*

And of particular Eſtates, ſome are created by Agreement between the Parties, and ſome by Act of Law. Twofold.

By Agreement, as thoſe before ſpecified. By Agreement

By Law, as Eſtates in Tail after poſſibility of Iſſue Extinct, Eſtates by the Courteſie of *England*, Dower, *&c.* for in Dower the Party is compellable by Law to compleat the Eſtate, *Ibid.* By Law.

Of

Of a Remainder.

Defined. A Remainder is the Residue of an Estate, at the same time appointed over, and must be grounded upon some particular Estate given before, granted for Years or Life, and so forth, *Noys Max.* p. 31.

When it begins. And ought to begin in Possession when the particular Estate endeth there may be no mean time between either, by Grant or Will *Ibid.*

Where cannot be. No Remainder can be made of a Chattel Personal: A Remainder cannot depend on a Matter *ex post facto*, to be done *in futuro*, as upon Estate Tail, upon Condition that if the Tenant in Tail sell, then the Land to remain to another, is a void Remainder, *Ibid.*

Five Things to be observed In every Remainder five Things are requisite,

1. That it depend upon some particular Estate, *Ibid. page* 123.

2. That it pass out of the Grantor, Donor or Lessor, at the time

time of the creation of the particular Estate whereon it must depend, *Ibid.*

3. That it vest during the particular Estate, or at the instant time of the determination thereof, *Ibid.*

4. That when a particular Estate is created, there be a Remnant of an Estate left to the Donor to be given by way of Remainder, *Ibid.*

5. That the Person or Body to whom the Remainder be limited, be either capable at the time of Limitation thereof, or else to be thereof capable during the particular Estate, See. *Noys Max. page* 124, 125, 126, 127. where a Remainder taketh effect, and it is void.

Of Reversion.

A Reversion, is the residue of an Estate that is left after some particular Estate granted out, in the Grantor; As if a Man grant Lands for Life, without further granting, the Reversion of the Fee-simple is in the Lessor, *Noys Max. p.* 32. Defined. Example.

Also

May commence after Remainder. Example.

Also it commenceth after a Remainder;

As when he in Fee-simple leaseth for Life to one, or in Tail, he may appoint a Remainder after that Estate, and a third in Fee-simple; for if he doth not dispose of the Fee-simple by way of Remainder, when he maketh the Gift for Life or in Tail, then the Fee-simple resteth in himself as a Reversion, See *antea*, *fol.* 5.

Nota.

Note, That after a Fee-simple, he can limit no further Estate, *Ibid.*

Of Fee.

Defined.

The division of Fee in divers respects are many, but for our present purpose it is sufficient to divide it into two sorts,

First, *Fee-simple or absolute.*
Secondly, *Fee-Tail or Fee-Conditional.*

Fee-simple.

Fee-simple is that whereof we are seized to us and our Heirs for ever.

Fee-

Fee Tail is that whereof we are ſeized to us and our Heirs with Limitation, that is, the Heirs of our Body, See *Lit. ca.* 2. *Lib.* 1. Fee Tail.

And note, That a Fee tail is either General or Special. Two-fold.

General is, where Land is given to a Man and the Heirs of his Body, not naming upon what Woman to be begotten; Therefore if he marry one or more Wives, and have no Iſſue by them, and again marryeth another by whom he hath Iſſue, this Iſſue ſhall Inherit the Land upon ſuch Grant. General.

Special is, when it is certainly ſet down of whom the Iſſue ſhall come; as when Lands are given to a Man, and the Heirs of their two Bodies; *Lit. ut ſupra*, and this ſpecial Eſtate is either expreſſed or implied. Special.

Expreſſed where it ſpecially limited what Iſſue ſhall inherit. Expreſſed.

Implied, as where upon Special Tail, either of the Parties die, and have no Iſſue between them, the ſurviving Party is improperly called a Tenant in Tail after poſſibility Implied, as in Frank-marriage.

of Iſſue extinct, See *Weſt*, *Symb.* *part* 1. *Lib.* 1. *ſect.* 40.

Thus I have made good to you, the Subject Matter promiſed in the *Frontiſpiece*, which might have been much enlarged by proper Precedents, but would much have ſhadowed that Light which hereby is intended.

Whereto for the Affinity of the Subject, is added a brief Dicourſe, ſhewing by what ways Property in Goods and Chattels, is or may be gotten.

CHAP.

CHAP. VI.

Shewing the ſeveral ways whereby a Man may get Property in Goods or Chattels.

Property in Goods and Chattels is gotten ten ways, *viz.*

1. *By Gift,*
2. *By Sale,*
3. *By Stealing,*
4. *By Waiving,*
5. *By Straying,*
6. *By Wreck of the Sea*
7. *By Forfeiture,*
8. *By Executorſhip,*
9. *By Adminiſtration,*
10. *By Legacy.*

Property by Gift. 1.

Property by Gift.

The Property of Goods may paſs by Gift, either by Word or Writing. If there be a general Gift made of all his Goods, This is ſuſpicious to be done of Fraud to deceive Creditors.

Fraudulent Deed of Gift.

Void against the Creditors.

Good against the Debtor.

And if a Man make a Deed of Gift, being in Debt, to prevent the taking of his Goods in Execution for his Debts, this Deed of Gift is void, as against those to whom he stood indebted; but as against himself, his Executors or Administrators, or any other to whom he afterwards shall sell or convey them, this Gift is good by that Deed, 50 *E.* 3. 6. 13 *El.* 5. 27 *El.* 4.

2. *Property by Sale.*

Property by Sale.

Bona fide good.

By Sale any Man may convey his own Goods to another; and although he fear Executions for Debt, yet he may sell them for Mony at any time before the Execution served, so there be no reservation of Trust between the Parties, as that of paying the Mony he may have the Goods again; for that Trust in such a Case doth prove plainly a Fraud to prevent the Creditors from taking the Goods into Execution.

Note,

Note, The Goods are liable to an Execution, ſo ſoon as it is delivered to the Sheriff, by a late Act.

Property by Stealing, &c. 3.

If a Man ſteal away Goods, or take them from me in jeſt, or borrow them of me, or take them as a Treſpaſſor, and not as a Felon, and carry them to a Fair or Market, and there ſelleth them, this Sale doth bar me of the Property of my Goods, ſaving that if it be of a Horſe, he muſt be ridden once over in the open Market or Fair, between the Hours of Ten and Sun ſetting, and to be tolled in the Toll-Book, and the Seller muſt bring one that will avouch his Sale, who is known to the Toll-Book Keeper, or elſe this Sale bindeth me not.

Goods ſtollen or taken in jeſt, Sold in a Market, &c. bars the Owner.

2,3 *P. M.* 7.

31 *Eliz.* 12.

And for any Goods where the Sale in Market or Fair ſhall bar the true Owners (being not the Sellers) of their Property, it muſt be a Sale in

Sale to bar the Owner muſt be a Market where uſually ſuch Things were ſold.

in a Market or Fair, where uſually Things of that nature are ſold, So that the Buyer know not of the former Property, and do pay Toll and enter it. Plate muſt be ſold at the Goldſmiths Stall, and not in his inner Shop, *Noy Max. p* 90.

Examples of Sale.

If a Man ſteal a Horſe, and ſell him in *Smith-field*, as before, the true Owner is barred by the Sale; But if he ſell the Horſe in *Cheap-ſide*, or *Newgate* Market, or *Weſtminſter* Market, the true Owner is not barred, becauſe thoſe Markets are uſually for Herbs, Fiſhes, and ſuch like, and not for Horſes: So whereas by the Cuſtom of *London*, every Shop is a Market all days of the Week, except *Sundays* and *Holydays*; yet if a piece of Plate, or Chain of Gold, or Pearl that is ſtollen or borrowed, be ſold in a Drapers Shop, or in a Scriveners, or in any but a Goldſmiths, as before, this Sale bars not the true Owner, and the like.

Stealing gaineth no abſolute Property, But the Owner may ſeize, &c.

Yet by ſtealing of the Goods only the Thief getteth no ſuch property, but that the Owner may ſeize them again whereſoever he findeth them, except

except they have been ſold in a Market or Fair after they were ſtollen, and that *bona fide* without Fraud; But if the Thief be condemned of the Felony, or outlawed therefore, or outlawed in any perſonal Action, or any way commit a Forfeiture to the Crown of his Goods, then the true Owner is without remedy.

Outlary in an Action perſonal, is a Forfeiture of Goods and Chattels. See the Author of the Terms of the Law.

Theſe Goods nevertheleſs (if preſently after they were ſtollen, the true Owner maketh freſh purſuit after the Thief and Goods, and take the Goods with the Thief) he may take them again; and if he make no freſh purſuit, yet if he proſecute the Felon ſo far as Juſtice requireth, that is, if he get him indicted and arraigned, and found Guilty, though he be not hanged, or have Judgment of Death, in all thoſe Caſes he ſhall have his Goods again, by Writ of Reſtitution to the Party in whoſe cuſtody they be, 21 *H.* 8. 11.

Freſh purſuit of the Felon. *Stanf. Pl. Cor. Lib.* 3. *cap.* 10 & 12.

Idem in his firſt Book *cap.* 27. ſaith, that freſh Suit may continue for 7 years.

4. *Property by Waiving.*

Property of Goods waived is in the King.

By waiving the property of Goods is thus gotten; A Thief having ſtollen Goods, and being purſued flying away, and leaving the Goods in the flying; this leaving is called Waiving, and the property is in the King, except the Lord of the Mannor by Cuſtom or Charter have right to them; but if that Felon be indicted or judged, or found Guilty, or Outlawed at the Suit of the Owner of the Goods, he ſhall have reſtitution of the Goods by Writ, as before.

But if the Owner proſecute Reſtitution will be made.

5. *Property by ſtraying of Live Chattels.*

Lord of the Mannor hath Eſtrays after a year and day

By ſtraying the property of ſtray Cattle is thus gotten; when they come into other Mens Grounds, ſtraying away from the Owner, Then the Parties or Lord in whoſe Grounds or Mannor they come, cauſeth them to be ſeiſed, and a With to be put about their Neck, and to be cryed in three Markets

kets adjoyning, ſhewing the marks of the Cattle, which done, if the true Owner claim not within a Year and a Day, then the property is in the Lord of the Mannor, if he have Eſtrays by Cuſtom or Charter, or elſe in the King, See *Briton cap.* 17. *See* Eſtrays in the Foreſt, *Anno* 27 *H.* 8. *cap.* 7.

Yet if a Man take Beaſts as an Eſtray, and keeps them three quarters of a Year, and after that again ſtray from him, and another happens on them; the firſt Lord which kept them for three Quarters, cannot take them again, becauſe that he had no property in them till he had kept them a Year and a Day, and Proclamation paſſed; for the poſſeſſion of the ſecond Seiſor is good againſt him who hath no property, 33 *H.* 8. *b. Eſtrays* 11.

If the Lord keep the ſtray three quarters and then loſe it, he gains no Property, 12 H. 8. 10. Though another Stranger find them.

6. *Property by Wreck.*

Property by Wreck, when a Ship ſinketh and no living Creature eſcapeth.

By Wreck of the Sea, the Property is thus gotten: When a Ship laden is caſt away on the Coaſt, ſo as neither Man, Dog or Cat eſcape alive out of the Ship to land, then all thoſe Goods be ſaid to be wrecked, (*Weſtm. prim. cap.* 4. *Anno* 3 *Ed.* 1.) and they belong to the Crown if they can be found, except the Lord of the Soil adjoyning, can entitle himſelf by Cuſtom, which we call Preſcription, or by the Kings Charter.

And the Wreck goes to the Crown, unleſs the Lord of the Soil can preſcribe.

If any Creature eſcape, the Goods are the Owners by claiming duly.

But if any of theſe eſcape alive the Goods are the Owners ſtill, ſo he come within a Year and a Day to claim them.

Nota.

Note, That *Fitzherbert* in his *Natura Brevium*, *fol.* 112. ſuppoſeth that if any of the Goods be caſt upon the dry Land by any in the Ship, it is no Wreck, ſubject to the Prerogative; for by this ſome of the

the Ship are preſumed to come to land, and ſtill to have a Cuſtody of the Goods, *Vide* Sir *Edward Coke Vol. 6. fol.* 107. *a.*

Property by Forfeiture. 7.

By Forfeiture, Goods and Chattels are thus gotten; If the Owner be outlawed; If he be indicted of Felony or Treaſon, and be found Guilty of it, or confeſs it, or refuſe to be tried by his Peers, or by Jury; or be attainted by Judgment; or fly for Felony, although he be found not Guilty; or ſuffer the Exigent to go forth againſt him, although he be not outlawed; or if he go beyond the Seas without Licence, in ſuch Caſes all the Goods that he had at the time of the Judgment, be forfeited to the Crown, except ſome by Charter can claim them, (as is before in ſome meaſure treated of,) for in theſe Caſes Preſcription will not ſerve, unleſs it be ſo ancient.

Goods forfeited to the Crown by Outlawry.

34 *H.* 8.
4 *H.* 7. 11.
35 *H.* 8. 8.
5 *E.* 6. *St.* 185.
20 *E.* 4. 5.
40 *E.* 3. 42. &c.

Unleſs claimed by Charter.

ancient as it had allowance before Juſtices of Eyre in their Circuit, or in the Kings Bench in ancient time.

8. *Property by Executorſhip.*

Property by Executorſhip where a Man makes a Will, &c.

By Executorſhip Goods are gotten thus: When a Man poſſeſſed of Goods, makes his laſt Will and Teſtament in Writing, or by Word, and maketh one or more Executors thereof, thoſe Executors have by ſuch Will, and the Death of that Party, all his Goods, Chattels and Leaſes for Years, Wardſhip of the Body and Lands of the Ward in Knight-Service, (but not in Soccage,) Leaſes for Years, and Rent-Charges for Years, Statutes, Recognizances, Bonds, Lands in Execution, Corn upon the Ground, Gold, Silver, Plate, Jewels, Mony, Debts, Cattle, and all other Goods and Chattels of the Teſtator, (if they be not otherwiſe deviſed before,) and the Executor may alſo give them away by

Note, By a Deviſe of all Goods, a Rent-Charge for Years will paſs.

Note, Moveables, are Horſes, Cattle, &c. and Perſonal Chattels.

Immoveables are Corn growing, and Fruit on Trees and Chattels real.

by Word or Deed, but not by Will; and if he do will *omnia Bona & Catalla ſua*, (all his own Goods and Chattels,) the Goods of the Teſtator paſs not thereby, neither ſhall they be forfeited by the Executor; and theſe Executors may meddle with thoſe Goods, and diſpoſe of them before they prove the Will, *Plow. Com. fol.* 525. Bransbury *and* Grantham, 24 *E.* 3. *fol.* 35. 32 *H.* 6. 34. 9 *E.* 4. *fol.* 33. 47. 7 *H.* 4. 18. *Noys Max. page* 103.

Perſonal which belong immediately to the Perſon of a Man; as a Cow, Horſe, &c.

Real not immediately to the Perſon, or iſſuing out of ſome immoveable thing to a Perſon.

But this Will muſt be proved, and the Ordinary may convent Executors to prove the Teſtators Will, and to bring in an Inventory; but if the Executor refuſe to prove it, he may commit the Adminiſtration of the Goods to the Widow, or next of Kin, or to both, which he pleaſeth, making requeſt, and may revoke it again at his pleaſure, *Noys Max.* 105. 3 *H.* 7. 14. *Plowdens Commentaries* 281.

21 H. 8. 5. The Will muſt be proved, or elſe Adminiſtration.

An Executor may releaſe before probate of the Will or Teſtament,

An Executor may Releaſe before Probate

ſtament, but cannot have Debt before the Probate, 7 *H.* 4. 18. *Coke* 5. *part* 28. *a.* Middletons *Caſe.*

Executor in his own wrong.

And a Man may be Executor in his own wrong, as if he meddle with the Goods, and after refuſes Probate, 20 *H.* 7. 5. 21 *E.* 4. 6. 11 *H.* 4. 71.

Or where a Man dieth Inteſtate, and a ſtrange Perſon taketh the Goods of the Inteſtate, and uſeth them, or ſells them, this maketh him an Executor of his own wrong: for when none aſſumeth to be Executor, nor takes Letters of Adminiſtration, there the uſing of the Goods is ſufficient to charge one as Executor of his own wrong; yet when there is an Executor who proveth the Teſtament, if in this Caſe a Stranger take any of the Goods and claim them for his own, this doth not make him an Executor of his own wrong, becauſe there is one lawful, *Co. Lit.* 5. Reads *Caſe, fol.* 33.

Where Executor in his own wrong, and where not.

Executor of his own wrong cannot pay his own Debts.

But an Executor of his own wrong, ought not to retain Goods in his own Hands to ſatisfie his own

own juſt Debt, (as a real Executor may,) for it is not reaſonable that one ſhould take advantage of his own wrong; yet it is clear that all lawful Acts that ſuch an Executor doth, are good, *Idem, fol.* 30.

Yet his actings to others are lawful.

Note, An Executor cannot aſſign over his Executorſhip, *Vaughan* 182. *Bedal* and *Conſtable.*

Note, If an Executor releaſe before Probate of the Will, and afterward take Adminiſtration, that Releaſe ſhall not bar him of an Action notwithſtanding, for the right of the Action was not in him at the time of the Releaſe, *Coke* 5. *p.* 28.

Executor releaſing before probate takes Adminiſtration, that Releaſe ſhall not bar him.

If one Executor prove the Will in the name of both, he that doth not Adminiſter, ſhall not be charged, *Noy* 102.

Executor not medling ſhall not be charged

But if the Executor do once any Action, that is proper to an Ex-

If he do, he is chargeable.

Executor, as to receive the Teſtators Debts, or to give Acquittance for the ſame, *&c.* he may not refuſe, *Ibid.*

Yet he may meddle with their Goods; Feed their Cattle and not be charged. 21 *H.* 6. 28. 20 *H.* 7. 5. 21 *E.* 4. 6.

Yet he may diſpoſe of the Teſtators Goods about the Funeral, or feed his Cattle leſt they periſh, or keep his Goods leſt they be ſtollen; Theſe things may every one do without danger, *Ibid.*

All the Executors muſt be named in their Action, otherwiſe if the Action be brought againſt them.

When Executors do bring an Action, it ſhall be in all their Names, as well of them as do refuſe as others; but an Action againſt Executors, muſt be brought againſt them, or him that doth Adminiſter only, and he which firſt cometh ſhall firſt anſwer, *Ibid. pa.* 103. 22 *Ed.* 3. 19. 15 *Ed.* 3. *Exec.* 8. 41 *Ed.* 3. *f.* 22.

Executor ſhall not waſt the Goods.

If the Executor do waſt the Goods of the Teſtator, he ſhall pay them of his own, *Noys Max. page* 104.

Executor excuſable in Treſpaſs.

If an Executor take the Goods of another Man amongſt the Goods of the Teſtator, he ſhall be excuſed of the taking in Treſpaſs, *Ibid.*

Note,

Note, An Executor muſt prove his Will, as aforeſaid, which is thus, They are to exhibit the Will into the Biſhops Court, and bring the Witneſſes there to be Sworn, and the Biſhops Officers who do uſe to keep the Original Will, do certifie the Copy thereof in Parchment under the Biſhops Seal of Office, which Parchment ſo ſealed, is called the Will proved.

The Will how proved.

See more of Executors following.

Property by Adminiſtration. 9.

Property of Goods by Adminiſtration is thus gotten: Where a Man is poſſeſſed of Goods dieth without Will, there ſuch things as Executors ſhould have had, if he had made a Will, come to the Adminiſtrator, and this Adminiſtration is granted by the Biſhop, firſt to the Wife if ſhe require it, or to the Children, or to the next of Kindred, (as is before men-

Property by Adminiſtration where a Man dies without Will.

31 *Ed.* 1. *ca.* 11.

To the Widdow or Children.

mentioned;) but if they refuſe it (as often they do) becauſe the Debts are greater than the Eſtate will amount unto; then ſome Creditor or other will take it as the Biſhops Officers will think fit. See after how Inteſtates Goods are to be diſtributed after Debts paid, *Ibid. Stat.* 29 *Car.* 2.

Or Creditor. See *Noys Max.* p. 105.

weſtm. 2. *Anno* 13 *Ed.* 1. *ca* 19.

In ancient times the Goods of one dying without Will, were committed to the Ordinaries diſpoſition, who was bound to anſwer the Inteſtates Debts, ſo far forth as the Goods would extend; but now otherwiſe, as before.

What Biſhop ſhall grant Adminiſtration.

The Rule.

It groweth often in queſtion what Biſhop ſhould have the right in proving of Wills, and granting the Adminiſtration of Goods: In which Controverſie the Rule is this, That if the Party dead, had at his death Goods of ſome reaſonable value, called *Bona Notabilia*, in divers Dioceſſes, then the Arch-Biſhop of that Province where he died, is to have the Probate of his Will, and to grant the Adminiſtration of his Goods, as the

Where *Bona Notabilia.* Goods in ſeveral Dioceſſes. Then the Arch-Biſhop.

Caſe

Caſe falleth out; otherwiſe the Biſhop of the Dioceſs where he died is to do it, by a Canon made 1 *Car.* 2. Canon 92, 93. *Bona Notabilia* muſt amount to five pounds.

Otherwiſe the Biſhop of the Dioceſs where he died.

And note, That a Teſtator making a Will, may aſſign as many Executors as he pleaſeth, being capable thereof, (*Weſts Symb. part* 1. *Lib.* 21. *ſect.* 637.) upon Condition, or Time; Upon Condition as if a Teſtator appointeth *J. S.* his Executor if he find ſufficient Sureties for the performance of his Will, before the proving thereof: Upon Time, as if the Teſtator maketh *J. S.* his Executor when he cometh to full Age, or when he cometh from *London*, or while he dwelleth at *London*, &c. *Weſt*, *Ibid.*

That a Teſtator making a Will, may make as many Executors as he pleaſeth, and upon Condition or Limitation.

And as theſe Executors may be ſo made, ſimply or upon condition, or with reference to time; ſo may Legacies and Devices be made to one or more ſimply, or conditionally, or with reference to or from time;

As

Example.

But note, That if a Chattel be given to one for Life, the Remainder to another, the Remainder is void; for a Grant or Deviſe for an hour of a Chattel is good for ever, and the Deviſee may diſpoſe of it; but if he do not, the other ſhall have it.

As if a Man deviſe that a Man ſhall have the Occupation of his Plate or other Chattels during his Life, or for Years, and if he die within the Years then that they ſhall remain to *M. A* and it is good, *Noys Max. page* 99, 100.

Executor not to meddle during Life of another Executor.

19 *H.* 8. By *Fitz.* See *Dyer.* 19 *H.* 8.

A Man makes *A.* and *B.* his Executors, and Wills that *B.* ſhall not meddle during the Life of *A.* and good, for he doth not reſtrain his intire power; for he may make one Executor of his Goods in *D.* and ſo he may divide the time, 32 *H.* 8. *B. Exec.* 155.

Executor having not medled may refuſe the Executorſhip.

If there be but one Executor made, yet he may refuſe the Executorſhip coming in the Court before the Biſhop or his Official, ſo as he have not before medled with any of the Goods, or with receiving of Debts, or paying of Legacies; and if there be many, and all refuſe, then is the Party dead

lead Inteſtate; and if there be more Executors than one, yet ſo many as liſt may refuſe the Executorſhip, and if any one of them take it upon him, the reſt that once did refuſe, may notwithſtanding take it upon them when they will, *Noys Max. page* 103. *Coke Lit.* ---- 5. *fol.* 28. *cont.* 18 *E.* 2. *Bro.* 37. 42 *El. Co.* 9. *fol.* 36, 37.

No Executor ſhall be farther charged with Debts or Legacies, than the value of the Goods of the Teſtators which come to his Hands, ſo that he foreſee that he pay Debts of Record firſt; as namely, Debts to the King; then upon Judgments, Statutes, Recognizances; and then Debts for Bonds or Bills ſealed, or for Rent unpaid, or Servants Wages, and then Debts due by Shop-Books, and for Contracts by Words; and laſtly Legacies, *Co. Lit.* 5. *Reeds* Caſe.

How Debts ought to be paid by Executor. Stat. 29 *Car.* 2. ſays, No Action to be brought to charge any Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer Damages out of his own Eſtate, unleſs the Agreement or ſome *Memorandum* thereof in Writing, and ſigned by the Party to be charged, or ſome by him lawfully authoriſed.

For

If Executor or Administrator pay not the Debts in course, they shall be charged. See *Wentworths Executor. p.* 189

For if an Executor or Administrator pay Debts to others before the Debts to the King, and pay Debts upon Bonds before Debts due by Records, or pay Debts upon Shop-Books, or for Contracts before those due upon Bonds, or for Arrearages of Rent, he shall pay the same to others in their Degrees out of his own Goods. *M.* 33 & 34 *Eliz.* Lady *Walsingham's* Case, *Noys Max. page* 104.

Debts of equal degree, Executor or Administrator may pay first which he will.

But yet the Law gives them choice; That where divers have Debts due in equal degree of Record or Specialty, he may pay which of them he will before any Suit be brought against him; but

Exception.

if any Suit be brought, he must first pay him that first getteth Judgment against him, 28 *H.* 8. *Dyer* 22. *Doct.* and *Stud. cap.* 10. *p.* 78. 41 *E.* 3. *El. Dyer* 232. *Co. Intr.* 148, 149, 286.

One Executor may do as much as all together.

Any one Executor may convey the Goods, or release Debts without his Companion; any one may do as much as all together, *H.* 48. *E.* 4. 14, 15.

But

But one Mans releaſing of Debts, or ſelling of the Goods, ſhall not charge the other to pay ſo much of their Goods, as was releaſed or ſold by the other, though there be not enough beſides. *But one ſhall not charge the reſt.*

But it ſhall charge the Party himſelf that did ſo releaſe, or ſell, or convey, See *Wentworths Executor p.* 321. but he muſt be above ſeventeen Years old, *Hil. 9. Jac. Rot.* 87. *But only himſelf.*

But it is ſaid to be otherwiſe of Adminiſtrators, becauſe they have but one joynt Authority given them by the Ordinary over the Goods, which Authority being given to many, is to be executed by them all joyning together, *Sed Quære*, for it is ſaid, *Adminiſtrators cannot act alone.*

That the power and charge of an Adminiſtrator, is equal in every point to the power and charge of an Executor, *Noy* 106. *Power of Adminiſtrator equal to Executor.*

If a Man make an Infant his Executor, the Ordinary may commit the Execution of the Will to the Tutor of the Child, for the Childs *Infant Executor muſt have a Tutor, &c.*

Childs behoof, until he be of the Age of ſeventeen Years and no longer, *Noy, Ibid.*

Adminiſtrator during minority, muſt do nothing to the prejudice of the Infant.

An Adminiſtrator during the minority of an Infant, may do nothing to the prejudice of the Infant; not ſell the Goods of the deceaſed, unleſs it be upon neceſſity to pay Debts, or that they would Periſh; nor let a Leaſe for a longer time, than whilſt he is Adminſtrator, *Noy, Ibid.*

Infant may make Acquittance.

An Infant upon the true payment of a Debt due to the Teſtator, may make an Acquittance, and it ſhall be good; for a Child may better his Eſtate, but not make it worſe, *Noy, page* 107.

Executor of an Executor.

Note, If an Executor die, making an Executor, the ſecond Executor is to be Executor to the firſt Teſtator, 25 *Ed.* 3. *Noys Max. p.* 103.

Executor or Adminiſtrator of an Adminiſtrator.

But if an Adminiſtrator die Inteſtate, or make an Executor, yet this Executor or Adminiſtrator, ſhall not be Executor or Adminiſtrator to the Inteſtate. But

But in this Caſe the Biſhop, called the Ordinary, is new to commit the Adminiſtration of the firſt Inteſtates Goods.

New Adminiſtration may be made.

If the Executors or Adminiſtrators do pay Debts, or Funeral Charges, or Legacies of their own Mony, he or they may retain ſo much of the Goods in kind of the Teſtator or Inteſtates again, and ſhall have property of that in kind, but not of Lands appointed to be ſold, 20 *H.* 7. 5.

When Executors or Adminiſtrators pay their own Mony, they may retain in value.

Note, That by the Statute 22 & 23 *Car.* 2. The Ordinary is impowred to call Adminiſtrators to an account for the Inteſtates Goods, and what remains clear (after Debts, Funerals, and juſt Expences allowed,) is to be diſtributed as followeth; One part to the Wife of the Inteſtate, and all the reſidue by equal Portions to and among the Children of the Inteſtate, and ſuch Perſons as legally repreſent ſuch Children, other than ſuch Child or Children, who ſhall have been advanced by the

Stat. 29 *Car.* 2. concerning Adminiſtrators.

Note, The Heir though he have been advanced, &c. is to have an equal part with the other Children, notwithſtanding, &c.

After the Inteſtates Debts, &c. paid, the Remainder to be diſtributed to the Wife and Children.

Inteſtate equal to the ſhare as ſhall come by ſuch Diſtribution to the other Children; if the diſtribution amount to more apiece than the advanced Child or Children had, then they muſt all be made equal: and if no Children, then one Moiety to the Wife, and the other to the next of Kin in equal degree; but not to any Collaterals after Brothers and Siſters Children;

Exception. If no Wife, all to the Children.

If no Children to the next of Kin, with ſome Cautions

If no Wife, then equally to the Children; If no Children, then to the next of Kin in equal degree to the Inteſtate, and their legal Repreſentatives, as aforeſaid, and not otherwiſe.

No diſtribution to be made till after a Year after the Inteſtates death; and every Perſon who is to have a ſhare, muſt give Bond with ſufficient Sureties to refund a ratable part of ſuch Debts as ſhall afterwards be ſued for, and recovered, or otherwiſe duly made to appear, to enable the Adminiſtrator to pay them with the Coſts, *&c.* This Act not to prejudice the Cuſtom of *London*, or other

other Customs peculiar to other Places, &c. *See the Statute.*

And by the Act 29 *Car.* 2. No Probate, or Letters Testamentary of a Nuncupative Will, shall pass the Seal till fourteen days after the Testators death, nor any Nuncupative Will received to be proved till Process first is sued to the Widow, or the next of Kin to call them in, to contest the same if they please; And by this Act it is further explained, That the former Act for setling Intestate Estates, shall not extend to Feme Coverts, (Women that are married,) that shall die Intestate; but their Husbands may have Administration, and enjoy their personal Estates, *&c.* as before.

Probate of a Nuncupative Will.

The Act not to extend to married Women, but their Husbands may have Administration as before.

And touching all these Matters concerning Executors and Administrators, you may read more largely in the Book called *The Office of Executors.*

10. *Property by Legacy*

The Executor must assent to the Legacy.

Is When a Man maketh a Will and Executors, and by that Will giveth a Legacy, he to whom such Legacy is so given must have the assent of the Executors, or one of them, to have that his Legacy; yet the property of that Lease or Goods bequeathed unto him, is said to be in him; but he cannot enter and take such Legacy without the assent of the Executors, or one of them, because the Executors are charged to pay Debts before Legacies; and if they assent to pay Legacies first, they shall pay the value of them to the Creditors out of their own Goods, if there be not otherwise sufficient to pay the Debts, 32 *H.* 8. 21 *E.* 4. 21. 94 *E.* 1. 90. 37 *H.* 6. 30. 2 *H.* 6. 16.

Or the Legatee shall not have it.

Debts must be paid before Legacies.

What Debts before Legacies.

And this is to be understood of Debts due by Record, or to the King, or upon Bond, or Bill sealed, or for Arrearages of Rents, or for Servants, or Workmens Wages; and

and alſo of Debts by Shop-Book, or by Bills unſealed, or Contracts by Word, for before them the Legacies are not to be paid, for it is now out of queſtion, *Co. Lit.* 9. *fol.* 88. *b. Doctor* and *Student Li.* 2. *cap.* 10 and 11. though formerly much controverted. *Yel.* 55, 56, 57. *Owens Rep.* 56. *Cro.* 1. 59. *Co. Lit.* 53. *Dyer* 114. 3 *Bulſt.* 235, 236

'Tis ſaid, If the Executor doubt he ſhall not have enough to pay every Legacy, he may pay which he will firſt; but he may not ſell a ſpecial Legacy of a Leaſe, or of Goods in Kind to pay a Mony Legacy; but he may ſell any Legacy he will to pay Debts if he have not enough beſides: Quere of this. Executor may pay which Legacy he will firſt. Exception.

Note, If a Man make a Will, and make no Executor, the Ordinary is to commit the Adminiſtration, *cum Teſtamento annexato*, (with the Will annexed,) and take Bond of the Adminiſtrators to perform the Will, and he is to perform it in ſuch ſort as an Executor ſhould have done, if he had been named, *Plow. Com.* 185. Will without Executor, how to be proved. See *Wentworth's Executor*, f. 4, 5.

And what hath been ſaid concerning Executors, Adminiſtrators, *&c.* ſhall here ſuffice, there being ſeveral Books now Extant, which treat of the Duty of Executors and Adminiſtrators, *&c.*

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